NON MEASURING BRIEF

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STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs appealed to this Court. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. 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.

2. Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include waste load allocations and load allocations is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

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

4. Whether EPA's adoption of credit for anticipated BMP pollution reduction to reduce the stringency of waste load allocations for point sources for implementation of the Lake Cheaplain TMDL was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implantation.

STATEMENT OF THE CASE

I. Factual Background

Lake Chesaplain is in the State of New Union and before the twenty-first century, was known to have "excellent water quality." (*See* District Court Opinion Pg. 7) The lake was used

for recreation both on its shores and in its waters. Boaters, fishers, swimmers, and beach goers alike all enjoyed what Lake Chesaplain offered. The beauty of Lake Chesaplain began to change in the 1990s. Economic development in the area brought in a hog production facility, a hog slaughterhouse to the area. (*See Id.*) The hog production facilities, also known as concentrated animal feeding operations (CAFOs), were not subject to CWA permits as they are considered "non-discharging" CAFOS exempt from permitting requirements. (*See* 40 C.F. R. § 122.23; *see* District Court Order, pg. 7) Under New Union statute, these CAFOs are subject to permits and regulated. (*See* District Court Order, pg. 7) This means the New Union Agricultural Commission has to review and approve nutrient management plans in relation to liquid manure wastes to fields. (*See Id.*)

At the same time, recreation on Lake Chesaplain brought in more residents. Most of these new homes were located near the east shore of Lake Chesaplain. (*See Id.*) Chesaplain Mills, the city to the north end of the lake, has a public sewage treatment plant (STP) that runs directly into Lake Chesaplain under and regulated by a CWA point source permit. (*See Id.*) The new homes used the public STP. (*See Id.*)

The existence of the hog facilities, slaughterhouse, and higher septic usage made the waters of Lake Chesaplain noticeably deteriorating. The lake began having an overgrowth of algae that left off a very offensive odor. (*See* District Court Order, pg. 8) This algea was caused by excessive phosphorus in the waters. (*See Id.*) The phosphorous levels of the lake should remain around .014mg/l, however after the economic growth of the area, the lake was testing from .020 to .034mg/l. (*See Id.*) The New Union Division of Fisheries and Environmental Control (DOFEC) reported the lake on the "impaired waters list" given to the EPA in 2014. (*See Id.*). DOFEC did not submit a TMDL. (*See Id.*) This is when Chesaplain Lake Watch threatened

to sue both agencies for not establishing a TMDL. (*See Id.*) The threat of a suit was dropped as long as TMDL rulemaking was conducted by New Union. (*See Id.*) A state rulemaking process began under DOFEC. (*See Id.*) Data showed that in 2015, the phosphorus loadings were totaling 180 mt; roughly 60 mt higher than it had to be to be in compliance. (*See Id.*)

Most of the phosphorous was coming from the CAFOs through ground water, even though they were categorized as "non-discharging." (*See* District Court Order, pg. 9) Another large contributor was the private septic systems, which were exempt from CWA permitting. (*See Id.*) Neither source had a permitted maximum limit for phosphorus, nor does the EPA have any guidelines. (*See Id.*) DOFEC publicly noticed their proposal to implement TMDLs in October 2017. (*See Id.*) This was a five-year phase to reduce the amount of phosphorus by 35%. (*See Id.*) The nonpoint source reductions, including those of the private septic systems, were going to be achieved through Best Management Practices (BMPs). (*See Id.*) The 35% decrease was only protested by the "CAFOs, other agricultural, residential septic system, and point source categories proved highly controversial." (*See Id.*) Chesaplain Lake Watch refused to take credit for the BMPs and stated New Union had no authority to implement them. (*See* District Court Order, pg. 10).

In July 2018, DOFEC adopted the TMDL without any waste load allocations or load allocations. (*See Id.*) The EPA rejected this plan pursuant CWA § 303(d)(2). (*See Id.*) In May 2019, after further review, the EPA adopted the original TMDL calling this joint plan the Chesaplain Watershed Implementation Plan (CWIP). (*See Id.*) The EPA did not lay out enforcement measures in the CWIP. (*See Id.*) It is known that both the nonpoint sources, the slaughterhouse and the STP, have yet to comply with the CWIP. (*See Id.*) New Union has also

not taken any steps to enforce the BMPs and lower phosphorus levels in the Lake Chesaplain watershed. (*See Id.*) The waters are still below standards. (*See Id.*)

All three parties, New Union, Chesaplain Lake Watch, and the EPA all brought claims and challenges to the District Court. (*See* District Court Order, pg. 11) First, New Union challenges the EPA's rejection of the proposed TMDL, arguing their proposal meets all requirements because it was a percentage plan and not a daily load based plan. (*See Id.*) Chesaplain Lake Watch brings two claims against the EPA: 1. the TMDL needs to be a daily measurement, not a five-year phased plan and 2. that the EPA cannot take credit for anticipated reductions through BMPs it has no authority to require. (*See Id.*) The EPA disagrees on the merits of both claims. (*See Id.*) The EPA also argues the case is not ripe. (*See Id.*)

The District Court found that the case was in fact ripe and the issues raised are fit for adjudication. (*See* District Court Order, pg. 12) The District Court also found that TMDLs are not specified in precedence or by EPA standards to be only daily measurements and that the five-year phased plan was adequate. (*See Id.*) The second claim brought by Chesaplain Lake Watch was found to also be meritless and the EPA did have authority and could in turn take credit. (*See Id.*) Finally, the claim brought by New Union was also found to be meritless and that TMDLs are allowed to be phased percentages.

All three parties appealed on their respective claims.

II. Procedural Background

A. The Matter Brought is Not Ripe

The effects of the TMDL were not felt at the time this case was filed. In order for the Plaintiff to bring a case forward, there would have to be injury that can be relieved. (*See generally* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967)). Before this court,

there is no injury presented that can be remedied. The State of New Union will not feel the effects of the TMDL plan until the end of the five-year phased plan. This Court nor the District Court should be asked to place themselves in the middle of this decision when there is no injury to the State of New Union; in fact the proposed TMDL plan was meant to make Lake Chesaplain better for the State of New Union.

C. The Vacating of the EPA's Definition of the Term "Total Maximum Daily Load"

New Union claims that the EPA's definition of TMDL fails the *Chevron* test because Congress spoke to the definition in the Clean Water Act. New Union believes that the EPA's use of the word "total" in particular is overly broad. The District Court agreed with New Union and parted ways with the Third Circuit's opinion in *American Farm Bureau Federation v. U.S. E.P.A.* and instead decided that because Congress did not speak to EPA supervision of state implementations in the CWA like they did in the Clean Air Act, then they must not have wanted it. The District Court also held that the EPA was expanding its jurisdiction in an impermissible way by defining TMDL as it did, comparing this case to *Utility Air Regulatory Group v. EPA.*

D. The Granting of Summary Judgment and Dismissing the Complaint

The Plaintiffs claim that the EPA did not show any indication that the State of New Union was going to follow through with the BMP contemplated. Their claim relied on the fact that the political atmosphere surrounding the proposed BMP was hostile. They claim that the State of New Union has not implemented the plan and it has been two years since it was proposed. The Plaintiff also claims that the court must view BMP and ask if there was a "reasonable assurance" that the implementation would lower the phosphorus in the water.

The District Court used the CWA, the EPA's lack of adoption of the "reasonable assurance" standard, and a highly deferential standard of review when answering the "arbitrary

and capricious" claims made by the plaintiff. Under a highly deferential standard of review, the court viewed the claim with a more favorable view given to the EPA and could not substitute its judgment for that of the agency's. (*See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994).

SUMMARY OF THE ARGUMENT

This court should rule the matter at hand is not ripe. To avoid the judiciary becoming entangled in a disagreement at the administrative level, it has been determined if there is not an injury that can be remedied, the case cannot be brought forth. Here, the State of New Union has suffered no injury due to the TMDL proposed and this Court cannot give relief where the Plaintiffs are asking it to be sought.

Multiple courts have decided that the term "total maximum daily load," specifically the "daily" is not to be taken literally. This question has been brought before numerous courts and the consensus lies in "daily" simply being an ambiguous term that cannot be followed. Load limits fluctuate due to seasons and other unstoppable forces. Daily measurements would be unrealistic and typically unobtainable.

Granting summary judgment and dismissing the claim brought by the plaintiff in regards to the EPA's proposed BMP being arbitrary and capricious. A court is not permitted to overturn any agency decision unless it was clearly done without merit. The EPA has used the proposed practices before, and they used the relevant data to make their proposal. The EPA can also prove that their proposed plan was made in a way that would be effective based on their data collection and research.

STANDARD OF REVIEW

This Court reviews the grant of summary judgement and shall grant summary judgment if the moving party shows that there is no genuine dispute in relation to material facts and the moving party is entitled to a judgment as a matter of law, pursuant Federal Rules of Civil Procedure Rule 56(a).

ARGUMENT

I. EPA argues that none of the challenges to the Lake Chesaplain TMDL are ripe for judicial review, as the mere adoption of a TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or other regulatory actions.

In order to determine ripeness, the court should evaluate the issue for fitness for judicial review and determine if either party would be prejudiced by the delay (*Abbot Laboratories v. Gardner*, 387 U.S. 136, 154 (1967)). In regard to the former, a dispute is considered not to be ripe for review if an administrative decision has not yet been implemented and the effects of such a decision have not yet been "felt in a concrete way by the challenging parties" (*Abbot Laboratories*, 387 U.S. at 148). The effect of the Lake Chesaplain TMDL will not be immediate--as it will depend on changes in the NPDES permits and the New Union implementation of BMP requirements (*See* District Court Order at 11). Because not all necessary administrative actions have taken place, this dispute should not be adjudicated.

The court would be overstepping its power by adjudicating this case, which would be at odds with the purpose of the ripeness doctrine itself. One of the purposes of the ripeness doctrine is to let agencies settle their disputes without the intervention of a court. The ripeness doctrine is

meant to curtail the power of the judiciary, as it is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," (*Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993). This is a dispute that does not require judicial intervention, as the effects of the TDML have not yet been felt, since changes have not been made in accordance with the TDML. There should be not judicial interference in administrative decisions that have yet to be formalized.

Neither the state of New Union nor the Chesaplain Lake Watch would be prejudiced by the delay. Because the TDML created by the EPA is adequate to address the problems of Lake Chesaplain, neither party would suffer any particular hardship. There are maximum loadings set in place for the Lake that were constructed in order to address the problems. Because of these measures put in place that aim to improve the quality of the lake, neither party faces hardship as a result of the delay.

II. The District Court erred in granting New Union’s Motion for Summary Judgement and vacating the Environmental Protection Agency’s regulatory definition of the term “total maximum daily load” because Congress did not define “total maximum daily load” in the Clean Water Act, so the EPA’s interpretation needs only be reasonable.

In a case challenging an agency’s statutory interpretation, the agency is afforded deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* if the agency’s interpretation is reasonable. *Chevron, U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984)*. The *Chevron* test has two parts. First, the Court must decide if Congress spoke directly to what specifically the agency is interpreting in the statute. If Congress has spoken directly to it, Congress’s interpretation must be followed, and the analysis is over. If Congress has not spoken

directly to it, the Court moves on to step two in which it determines whether the agency's interpretation is reasonable and if it is reasonable, it is allowed regardless of how the Court feels about it. *Id.* at 842-43.

New Union disputes the EPA's definition of the term "total maximum daily load" (TMDL) as "the sum of individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). New Union argues that it is unreasonable for the word "total" in total maximum daily load to require all of the proposed individual reductions needed to meet the total be allocated. They say that CWA § 303(d) defers to § 303(e) for TMDL implementation, which is true, but CWA § 303(e)(3)(C) clearly states that TMDLs are to set in accordance to § 303(d). Therefore, although § 303(e) is about the implementation of TMDLs, § 303(d) is about setting and approving TMDLs. Additionally, although § 303(e) does not mention EPA intervention in state implementation of TMDLs, § 303(d)(2) specifically says the EPA Administrator may disapprove state established loads "and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan."

Furthermore, the EPA adopted New Union's original TMDL. It did not come up with the numbers out of thin air and the numbers are not wildly out of the ordinary. New Union compares the EPA's TMDL in this case to the EPA's interpretation of the Clean Air Act in *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302 (2014). In *Utility*, the EPA "set standards for emissions of 'greenhouse gases'. . . . . from new motor vehicles." 573 U.S. 302 at 307. The standards would have been 'the single largest expansion in the scope of the [Act] in its history.' *Id.* at 310 (citing the Clean Air Act Handbook at xxi). The EPA itself said "that this

would constitute an 'unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,' yet still be 'relatively ineffective at reducing greenhouse gas concentrations.'" 573 U.S. 302 at 310-11 (citing 73 Fed.Reg. 44420 at 44355). When the EPA sets a TMDL for one part of one body of water in one state, it does not affect the entire country, much less every household in the country. Further, the TMDL that the EPA decided on was developed by New Union, and New Union and the EPA thought the TMDL would be effective for reaching the water quality standards, unlike the new standards in *Utility* that the EPA did not think would meaningfully reduce greenhouse gas concentrations.

Moreover, New Union argues that the EPA's definition of TMDL fails part one of the *Chevron* test, meaning that Congress defined TMDL or at least spoke to what it could or could not include. This is not the case. Section 303(d) of the Clean Water Act does not define TMDL. CWA § 303(d)(1)(C) states:

> "[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

It does not speak to the definition of TMDL. In *American Farm Bureau Federation v. U.S. E.P.A.*, the Farm Bureau challenged EPA's definition of TMDL saying that Congress was unambiguous in § 303(d)(1)(C) and that "a TMDL can consist only of a number representing the amount of a pollutant that can be discharged into a particular segment of water and nothing more." *American Farm Bureau Federation v. U.S. E.P.A.*, 792 F.3d 281, 294 (2015). In executing *Chevron* step one, the court looked specifically at "whether in calculating and

expressing 'total maximum daily load,' the EPA may include allocations of pollution levels among different kinds of sources" and the Court notes that "many circuit and district courts have defined TMDLs to accord with the EPA's regulations (implying they did not present a problem). *Id.* at 295. The Third Circuit explicitly states that "Congress was ambiguous on the content of the words 'total maximum daily load': they are not defined in the statute, and 'total' is susceptible to multiple interpretations." *Id.* at 298. Additionally, the Court noted that in *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court held that the Clean Water Act falls into the category of complex statutory schemes that require technical or scientific knowhow in which an agency is afforded *Chevron* deference. *Id.* at 296. Furthermore, the goal of the Clean Water Act is to eliminate pollution in our waters. CWA § 101(a)(1). Limiting the EPA's definition of TMDL as New Union suggests would be completely contrary to the very goal of the Clean Water Act.

Finally, the District Court itself points out that Congress does not give direction as to TMDLs. They note that Congress did so with the Clean Air Act by including EPA supervision for state implementation of air quality standards. The District Court tries to argue that because Congress did not include such a requirement in the Clean Air Act, they must not have wanted the EPA to get involved with state implementation, but the fact of the matter is, if Congress can explicitly include something, they can explicitly exclude it as well. Congress did not do that with the definition of TMDL in the Clean Water Act, and the EPA's definition should therefore be afforded *Chevron* deference.

III. The EPA's choice of expressing Lake Chesaplain Watershed's TMDL in annual terms to being phased over five years is consistent with the requirements of the

Clean Water Act because the EPA has the discretion to reject a state's TMDL and redefine what the water quality standard will be, including redefining the TMDL, as long as the new WQS will rectify the problem.

The statute in question, 33 U.S.C. § 1313(d)(1)(C), along with the rest of the Clean Water Act, describes the kind of TMDL that *states* should develop. Congress chose the words of the statute deliberately. (*See Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006); *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837 (1984)). It was an intentional choice to direct the states to create a TMDL, and if the EPA considered it to be inadequate, for the EPA to reject it. Because "statutory analysis begins with the plain meaning of a statute" (*NRDC v. Muszynski*, 268 F.3d. 91, 98 (2d Cir. 2001)), then the statute should be scrutinized. The statute 33 U.S.C. § 1313(d)(1)(C) reads:

> "Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

(33 U.S.C. § 1313(d)(1)(c)). The standards that are set forth are expressly supposed to be followed by the states. This statute tells the *states* what to do. This is the case throughout 33 U.S.C. § 1313. To begin, 33 U.S.C. § 1313 (d)(1)(c) reads "Each *State* shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority

ranking, the total maximum daily load…"(33 U.S.C. § 1313 (d)(1)(c)), 33 U.S.C. § 1313 (d)(1)(d) reads "Each *State* shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load…"(33 U.S.C. § 1313 (d)(1)(d)), and 33 U.S.C. § 1313 (d)(3) reads: "each *State* shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load…" (33 U.S.C. § 1313 (d)(3)).

There is nowhere in the statute that tells the Administrator, in this case the EPA, to establish a total maximum daily load (hereinafter "TMDL"), and the specifications that come along with that. The statute only directs the *states* to establish a TMDL with seasonal variations, etc. This view is supported by the statement made by the Third Circuit court of Appeals in American Farm Bureau Federation v. EPA: "TMDLs happen after a state enacts pursuant to its law (but required by the Clean Water Act) 'water quality standards.'"(*Am. Farm Bureau Fed'n v. EPA*, 792 F.3d, 289 (2015)). TDMLs are what the states are required to develop. If the TDML that a state submits does not fulfill the requirements of the statute, the EPA can then come up with its own TMDL and overall WQS, with the only requirement that it adequately addresses the issues with the water. Further, this interpretation cannot be set aside because it is unsatisfactory to CLW, as "the court cannot ignore the text by assuming that if the statute seems odd to us, i.e., the statute is not as we would have predicted beforehand that Congress would write it, it could be the product only of oversight, imprecision, or drafting error" (*Engine Mfrs. Ass'n v. United States EPA*, 88 F.3d 1075, 1088 (1996)).

When a water is categorized as impaired, states are required to submit to the EPA a TMDL in accordance with the standards listed in 33 U.S.C. § 1313(d)(1)(C) (quoted above). Then, the EPA will review the submission and will approve or reject any part of the process that

the state constructed. (33 U.S.C. § 1313(c)(3), (d)(2)). DOFEC did not submit a satisfactory TMDL (Record at 8). Therefore, it was up to the EPA to remedy the problem. It was necessary for the EPA to reject the plan by CLW, because based on the scientific conclusions of The Chesaplain Commission, much of the phosphorus discharge was coming from nonpoint sources, therefore making CLW's plan to have zero discharge from point sources inadequate (Record at 10). There have not been any changes made by New Union in accordance with EPA's adoption of the Lake Chesaplain TMDL (*Id.*) There has been no action to reduce phosphorus loadings by nonpoint sources, and the waters still violate water quality standards (*Id.*) Because of this continued violation, it was necessary for the EPA to step in and create new WQS.

If the EPA disapproves of the WQS, it can then create its own WQS. (*Id.*) Because of the clear issues with Lake Chesaplain and the inaction of the CLW, disapproval was necessary. The Supreme Court pointed out in *Department of Energy v. Ohio* that the Federal Government, through the EPA, "maintains an extraordinary level of involvement" (*Department of Energy v. Ohio*, 503 U.S. 607, 634 (1992)). This involvement includes the authority to reject a state's WQS and create its own. This authority is also mentioned by the Supreme Court in *Arkansas v. Oklahoma*, demonstrating that through the Clean Water Act, the states and the EPA have "…broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution" (*Ark. v. Okla*., 503 U.S. 91, 108 (1992)). This same viewpoint was also put forward by the Third Circuit Court of Appeals, when in *American Farm Bureau Federation v. EPA*, the court wrote that "Congress granted broad regulatory authority to the EPA" (*Am. Farm Bureau*, 792 F.3d at 297). It follows that because the EPA was granted such broad authority, it also has the authority to redefine what a TMDL is based on the circumstances of the situation.

It is also worth mentioning the point that was made by the court in American Farm

Bureau Fed'n: "…a wave of citizen-suits in the 1980s led to a consensus that a state's failure to submit a TMDL should be deemed a 'constructive submission' that no TMDL is needed, triggering the EPA's duty to accept that conclusion or promulgate its own TMDL" (*Id.* at 290.)) This viewpoint promulgated further supports the idea that it is not the TMDL that matters, but the steps that the EPA takes to address issues with bodies of water.

As stated, it is a reasonable interpretation that the EPA has the authority to redefine the TMDL. If the EPA choses to reject the WQS, then it has the discretion to establish a WQS that it determines to be "necessary to implement the water quality standards applicable to such waters' ' (33 U.S.C. § 1313 (d)(2)). While a TMDL that the states are directed to establish would normally mean a total maximum daily load, the EPA has the broad authority to redefine the WQS, including redefining what a TMDL can be. According to 40 C.F.R. § 130.2(i), TMDL is defined as the sum of "waste load allocations' ' and "load allocations' ' (40 C.F.R. § 130.2(i)). There is no mention of the time frame being daily. The only direction that the EPA receives is to create a new WQS in the following cases:

> (4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—
>
> (A)if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or
>
> (B)in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

> The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(33 U.S. Code § 1313 (c)(4)).

Basically, the only guidance that the EPA is given for this new revised standard is that it should be in accordance with the statute. Nowhere does the statute specifically explain how the EPA should define a TMDL, as the court in *American Farm Bureau* points out (*Am. Farm Bureau* at 298). This is very vague, and therefore arguably provides the EPA with the discretion in choosing how it wants to create its new WQS. Although there are no specific guidelines for the EPA, the Administrator could look to the guidelines for the revised standards by the state for some guidance:

> "Such revised or new water quality standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."

(33 U.S. Code § 1313 (c)(2)(A)). Again, nowhere within these guidelines is any mention of how the EPA should define a TMDL, nor does it mention a requirement of seasonal variations. What is mentioned is the overall important goal of improving the water quality and keeping the water at a safe level for multiple possible uses. Clearly, these are the most important goals.

In accordance with the standards, the EPA's WQS will adequately bring down the phosphorus levels in the water. Because the EPA has the discretion to redefine the WQS, it follows that it can redefine the TMDL. Therefore, EPA's plan to have a phased implementation over five years is consistent with the CLW. This interpretation of the statute is similar to the interpretation of the Second Circuit in *NRDC v. Muszynski*, where the court said that a TMDL can be up to interpretation. The court concluded that it would defy logic to always put it into daily terms, as "effective regulation may best occur by some other periodic measure than a diurnal one" (*NRDC*, 268 F.3d. 91 at 99)). The court went on to say that a TMDL can be expressed in a different time frame "where such an alternative measure best serves the purpose of effective regulation of pollutant levels in water bodies" (*Id.*) In that case, expressing a TMDL in daily terms would have been inappropriate because phosphorus levels can vary seasonally and annually (*Id.*) In this case, the Chesaplain Commission's supplemental report that it issued in July 2016 calculated the maximum phosphorus loadings in annual terms (Report at 8). The maximum loading was calculated at 120 metric tons (mt) annually. Because it is in annual terms, it follows that the TMDL should be in annual terms. This is an indication that an annual TMDL makes more sense in this case, as found by the Commission. This was the same situation in *NRDC v. Muszynski*, where it was found that measuring phosphorus loadings daily just did not make sense in the circumstances.

The EPA argues that everything stated thus far is a fair interpretation of the intent of

Congress, as it required by *Chevron* (*Chevron*, 476 U.S. 837) Congress clearly meant to provide the states with specific guidelines in constructing the WQS, like expressing the TMDL in daily terms, and allowing for seasonal variations. However, it was also Congress's intent to allow a broad authority to the EPA when revising the WQS. It is important to keep in mind that the EPA would only have to create its own WQS if the state's WQS were inadequate. And, the EPA does not completely make up a WQS out of whole cloth—the standards still have to be sufficient to rectify the problems. The text of the CWA does not show a desire of Congress to limit the EPA to these standards, just the states. There is a check on the states because the EPA would only be stepping in if the state's WQS are considered to be inadequate. While the DC Circuit Court stated that we cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications" (Friends of Earth, 446 F.3d 140 at 144), this is exactly what CLW is trying to do in this case.

IV. The EPA was not acting arbitrarily and capriciously

Before the Court there is only one question: was the decision of the EPA to implement their own program one of reason or one that was arbitrary and capricious? Under 5 U.S.C.A. § 706, the definition of arbitrary and capricious is not defined. That means Congress left the definition ambiguous. Because the statute was left ambiguous, *Chevron v. NRDC* is the authority this Court should look to. Under *Chevron*, the court ruled that, "if [a] statute is silent or ambiguous with respect to specific issue, [the] question for court is whether [the] agency's answer is based on permissible construction of statute."

Under 40 C.F.R. § 130.2(i), the EPA can make waste load allocations less stringent under BMPs or other nonpoint source pollution controls if they make it practicable for more stringent load. Here, CLW relies on the "reasonable assurance" spectrum to judge if the EPA could

control nonpoint sources under their TMDL. This Court must look at the arbitrary and capricious claim in a highly deferential light and cannot forgo the agency's decision. (*See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994).

The power to deem the EPA's adoption of a credit for anticipated BMP pollution reduction arbitrary and capricious means that the EPA would first have to fail to prove that the BMP credit was in line with the CWA and second that the BMP credit program had not been a prior practice. The EPA can prove both in this case. The Second Circuit has come close to defining clearly what would constitute as arbitrary and capricious in *NRDC v. Muszynski* when they stated that the scope is narrow under the Administrative Procedure Act (APA) and limited to examining the record and deciding if the program was based on relevant facts and if those facts were clearly judged in error.

Chesaplain Lake Watch makes the claim that the adoption of the Chesaplain TMDL, total daily maximum load, goes against the CWA because it is not a daily load, but an annual measurement. Under the CWA, TMDL has been found to any amount of time or time frame that the EPA deems adequate when the alternative measurement is the best measurement and is effective in fixing the issue. (*Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2001).) The annual load was used and upheld in *Friends of the Earth v. U.S. E.P.A.* This case involved pollutants in a water source such as we have in this case. The court ruled the language was ambiguous and open to interpretation by the court and if the EPA could justify their usage of the annual daily load, they could use it under the CWA. The court also found in *NRDC v. Muszynski* the length of time was not dependent on the word "daily" in TMDL, but more so on what would work best to achieve the goal; in this case lowering phosphorus levels in the

water. The practice of implementation by the EPA of plans that are not daily loads is not something new or out of character. In fact, the TMDL must be upheld by this Court if it can be proven reasonable.

Lake Chesaplain was having extremely elevated phosphorus levels that were clearly caused by animal waste runoff from the newly established slaughterhouses and hog farms as well as provenly linked to septic runoff as a result of the influx of new homes in the area. The only duty that CLW claims the EPA owes is to justify their credit for nonpoint source BMP pollutant loading reductions has a "reasonable assurance" that its proposed implementation will succeed in lowering the phosphorus levels. The lower court found that the EPA has never adopted this standard, so it receives no deference. However, even if the EPA had adopted that standard, the court found the planning and information program fell within the reasonable scope of lowering the phosphorus levels in the water and making Lake Chesaplain a safer body of water and lessening the offensive odors given off by the excessive algae growth.

The EPA used the data to make their suggested TMDL. Using that data, they formulated a five-year phasing plan to eliminate the excess phosphorus in Lake Chesaplain. This is sufficient for a planning and information program to not be considered arbitrary and capricious. In *State Far*m, it was determined that the agency only had to use the relevant data to put forth an explanation as to their implementation for it to be legitimate. (*See* State Farm Mut. Auto. Ins. Co., 463 U.S. at 43) This basis for legitimacy was upheld nearly thirty years later in the 2019 decision of Blue *Water Baltimore v. Wheeler*. Though the decision ultimately found the EPA acted illegitimately, it did uphold the basis of legitimacy in the EPA's programs if based on relevant data. (*See Blue Water Balt., Inc. v. Wheeler*, Civil Action No. GLR-17-1253 (D. Md. Mar. 22, 2019)) Furthermore, a court must uphold an agency program that "adequately

explained " and supported by the data on the record. (*See Id.*) The program in question does not have to be perfectly derived either. As long as the EPA plan is attempting to better the situation, the court should not interrupt the plan and its intended mission.

The only instance of a court finding an implementation by the EPA as arbitrary and capricious occurs in *Blue Water Baltimore Inc., v. Wheeler*. This case involved the EPA refusing to regulate stormwater runoff in relation to private businesses. The court ruled that the deference in *Chevron* does not apply unless the statute is ambiguous. In *Blue Water*, the statute was not ambiguous, and the EPA was responsible for regulating stormwater runoff. Before this Court, the statute is ambiguous and has been decided in numerous other decisions under 40 CFR § 130.2(i) that the word "daily" was not binding and that the EPA could implement a five-year plan. (*See also* 5 U.S.C.A. § 706; 33 U.S.C.A. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i).) The lower court also found that, even though the statute is ambiguous in relation to the CWA requiring nonpoint sources to comply with implemented proposals, and left that decision up to the State, the EPA was not acting arbitrary and capricious. The proposal by the EPA in this case was simply the EPA using their regulatory standards to address dangerous phosphorus levels in Lake Chesaplain.

CONCLUSION

This court should affirm the lower court's decision in part and overturn the lower court's decision in part. Congress did not speak to the definition of "total maximum daily load" in the Clean Water Act so the EPA should be afforded *Chevron* deference or should at least pass part one of the *Chevron* test.