TEAM 49

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

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, Judge Romulus N. Remus.

Brief of Defendant-Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The United States Environmental Protection Agency (EPA) appeals from an Opinion and Order granting partial summary judgement for plaintiff Chesaplain Lake Watch (CLW) and intervenor The State of New Union, entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and appellants filed a timely notice of appeal according to Fed. R. App. P. 4. This Court has jurisdiction to review the decision of the United States District Court pursuant to 28 U.S.C. § 1291, which states that United States Courts of Appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF ISSUES PRESENTED

I. Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review.

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

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

IV. Whether EPA's adoption of a credit for anticipated BMP pollution reduction was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

STATEMENT OF THE CASE

A. Nature of the case. The consolidated actions before the Court concern the declining water quality in Lake Chesaplain, and the regulatory response measures taken by the State of New Union (NU) and The United States Environmental Protection Agency (EPA) (R. at 4). The plaintiffs are the State of New Union and an environmental organization called Chesaplain Lake Watch (CLW) (R. at 4). Together, they bring consolidated actions regarding the EPA's determination to disapprove NU's proposed Total Maximum Daily Load (TMDL) for phosphorous loadings (pollution) in the Lake Chesaplain watershed and then propose a different TMDL under the Clean Water Act (CWA) § 303(d), 33 U.S.C. § 1313(d) (R. at 5).

In their initial Complaint, NU sought "a declaration that the EPA's rejection of its proposed TMDL, and the regulations governing TMDL submissions EPA based this rejection on, are invalid." (R.at 5). CLW, in their initial complaint sought a "declaration that the substantive provisions of the EPA Lake Chesaplain phosphorous TMDL are insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious" under the Administrative Procedures Act (APA) 5 U.S.C. § 706, "and unsupported by the record." (R. at 5). The District Court denied the EPA's motion for summary judgment in part, granted CLW's

motion for summary judgment in part and granted NU's motion for summary judgment vacating the EPA's determination to reject NU's proposed TMDL and substitute its own (R. at 5).

B. Statutory and regulatory background. The Clean Water Act (CWA) is a regulatory framework created in efforts to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA relies on two strategic pillars to control water pollution: water quality standards (WQS) and technology-based regulations. *Id.* CWA has built a system of permitting and regulation for point source discharges of pollutants (R. at 5). Point sources are artificial constructs with statutory definition. *Jeffrey G. Miller, Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense,* 44 Envtl. L. Rep. 10770 (2014) at 195. CWA defines a "point source" as any "discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." CWA § 502(14). This definition includes any concentrated animal feeding operations (CAFOs) that allows discharge into listed waters, but excludes agricultural discharges, return flows caused by agricultural irrigation, natural occurrences and other unchanneled sources. Miller at 195. Such excluded sources are called 'nonpoint sources' and are not subject to regulations under the CWA permitting system. (R. at 5).

The EPA and NU, as well as all other states work to navigate the CWA through "cooperative federalism." *New York v. United States, 505 U.S.* 144 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264 (1981). In theory, this approach allows for maximum efficiency by having the federal EPA set national standards, then allowing the States the latitude to contemplate whether the federal standards will be effective in improving the water quality, and then determine how to implement it through their own regulatory systems (R. at 5). "States are expected to administer both the permitting aspects of the CWA, *see* CWA

§402(b), 33 U.S.C § 1342(b), and the water quality improvement aspects of the CWA. *See* CWA §§ 208, 303; 33 U.S.C. §§ 1288, 1313; R. at 5. When a state fails to take on these responsibilities, those aspects fall under the administration of the EPA (R. at 5).

C. Water Quality Standards (WQS) is a list of designated uses for each body of water that is deemed impaired. 33 U.S.C. § 1313(c)(2)(A). After a state establishes WQS for all impaired water bodies, it must then perform an assessment of each body of water's ability to meet the WQS following implementation of the technology-based point source controls under the CWA. R. at 6; *See* CWA § 303(d), 33 U.S.C. § 1313(d). Once a water is placed on the CWA § 303(d) Impaired Waters list, the state is directed to "develop, and submit to [the] EPA, a TMDL for the offending pollutants for that water body 'at a level necessary to implement the applicable WQS 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.'" R. at 6; CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).

D. Here, a TMDL is a calculation of the maximum amount of phosphorous allowed to enter Lake Chesaplain in order for that body of water to meet WQS. 40 C.F.R. § 130.2(i). This means the state must also allocate the loading limits among the point sources, while considering the impact of nonpoint and natural sources (R. at 6). States may take credit for reductions in nonpoint sources through implementation of Best Management Practices (BMPs) or other incentivized controls; the TMDL process allows for nonpoint source control tradeoffs. 40 C.F.R. § 130.2(i).

E. Since 1972, it has always been within the EPA's authority to review and approve or disapprove each step of the WQS process. This includes the designation of uses for impaired waters, establishing water quality criteria, and establishing TMDLs. R. at 6; *See* 33

U.S.C. § 1313(c)(3), (d)(2). If the state fails to establish TMDLs in accordance with the CWA, the EPA is directed to do so on their behalf to the extent which they have not. *Id.*

F. NPDES (National Pollutant Discharge Elimination System) permits are the principal means for implementing technology-based requirements and WQS. 33 U.S.C. 1342(a)(1), 1311(b)(1)(C); 40 C.F.R. 122.44(a), (d)(1). "Under the CWA, EPA authorizes the NPDES permit program to state, tribal, and territorial governments, enabling them to perform many of the permitting, administrative, and enforcement aspects of the NPDES program." [*https://www.epa.gov/npdes/about-npdes*]. EPA retains mere backstop authority. The Division of Fisheries and Environmental Control (DOFEC) is the state of New Union's designated agency in charge of achieving WQS, submitting a TMDL for Lake Chesaplain and overseeing the NPDES permit system (R. at 8).

STATEMENT OF FACTS

Up until the 1990's, Lake Chesaplain enjoyed 275 miles of clear waters. The lake was home to several lakefront vacation communities, and attracted boaters, anglers, and lovers of outdoor recreation. Lake Chesaplain is located entirely in New Union (R. at 7). Throughout that decade four major changes took place, all of them located within the Union River watershed. The first was the construction of "ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs). The second was the construction of a large-scale slaughterhouse capable of producing upwards of fifty million pounds of pork per year in Chesaplain Mills. The third was a home development boom on the Lake Chesaplain shoreline which was largely serviced by septic systems not subject to CWA permits. To add further concern for WQS, Chesaplain Mills has a publicly owned sewage treatment plant (STP) that is

allowed to discharge directly into Lake Chesaplain in accordance with its CWA point source permit (R. at 7). The CAFOs are not subject to the CWA permits because they are not deemed to be "non-discharging" point sources and are therefore exempt from permitting requirements under the EPA. *See* 40 C.F.R. § 122.23; *see generally Nat'l Pork Producers Council v. EPA,* 635 F.3d 738 (5th Cir. 2011). Instead, the CAFOs are regulated by NU through site specific nutrient management plans for application of manure waste to fields as fertilizer (R. at 7).

In 2008, NU created the Lake Chesaplain Study Commission (R. at 8). Four years later the Chesaplain Commission issued a report (the 2012 Report), which concluded that Lake Chesaplain was suffering from excessive algae growth known as eutrophication (R. at 8). The cause of the excess algae growth was high levels of phosphorous in the water body. The commission then determined that 0.014 milligrams per litre (mg/l) was the maximum level allowed throughout the lake in order for it to become healthy. At that time the levels ranged from 0.020 to 0.034 mg/l (R. at 8). In 2014, DOFEC adopted 0.014 mg/l as the official water quality criteria for Class AA waters such as Lake Chesaplain (R. at 8). DOFEC then compiled its § 303(d) Impaired Waters list to the EPA absent a TMDL for Lake Chesaplain (R. at 8). EPA accepted the submission, and in 2015 Chesaplain Lake Watch (CLW) served notice to NU and the EPA threatening legal action for the failure of either agency to establish a TMDL for Lake Chesaplain but agreed to not pursue the suit if NU conducted a TMDL rulemaking, which DOFEC then undertook (R. at 8). In 2016, the commission issued a report with the maximum phosphorous loadings, consistent with the 0.014 mg/l standard to be 120 metric tons (mt) per year, and that the current loadings based off of calculations from 2015 to be 180 mt.

Despite following the "state-mandated nutrient management plans and the CWA exemption for agricultural stormwater," the CAFOs were contributing substantial phosphorous

loadings. R. at 9; 33 U.S.C. § 1362(14). The report also showed a significant level of phosphorous loadings coming from private septic systems that are also exempt from CWA permitting as discharges from groundwater rather than surface water. *See Septic Systems Overview, EPA,* https://www.epa.gov/septic/septic-systems-overview (last visited Aug. 10, 2021).

The DOFEC plan was presented to the public for comment in October of 2017 (R. at 9). The plan was designed to implement the TMDL through an "equal phased reduction" by point and nonpoint sources over a 5-year period, falling from 180 mt to the desired 120 mt. The point source reductions would be achieved by means of permit limits. Nonpoint source reductions would be reached by means of incentivized BMP programs; for agricultural sources, these would include modified feeds, manure treatment, and manure application restrictions, and for private septic systems the BMPs would consist of tank inspection and more frequent pumping schedules (R. at 9). While no objected to the science behind the report, everyone objected to its effects. Lakefront homeowners balked at the cost of septic maintenance and required pumping (R. at 9). The STP and the Slaughterhouse balked at the cost of the treatment system required by the DOFEC plan (R. at 9). Lastly, CLW objected to anyone receiving credit for phosphorous reductions in nonpoint sources because the proposed BMPs were insufficient and outside of NU's authority (R. at 9, 10). CLW then demanded that both the point sources be allowed zero phosphorous discharges, effectively making operation for the STP and Slaughterhouse so challenging and expensive to the point of closure or bankruptcy, in an effort to reach the sixty-three mt annual reduction goal (R. at 10). CLW also claims that a phased annual reduction plan is inconsistent with CWA requirements for TMDLs (R. at 10). This is incorrect. CWA § 303(d)(2).

The CAFOs then appealed to DOFEC, arguing the EPA has no authority to implement loading limits through BMPs or any other means against nonpoint sources (R. at 10). DOFEC agreed and in July of 2018, they adopted a TMDL with no wasteload (WL) or load allocations and a singular 120 mt annual maximum (R. at 10). EPA rejected the TMDL, pursuant to CWA § 303(d)(2), and adopted DOFEC's original phased reduction proposal in May of 2019 (R. at 10). The plan was named the Chesaplain Watershed Implementation Plan (CWIP) and did not venture into how exactly the proposed BMPs would be enforced (R. at 10).

In November of 2018, the Slaughterhouse's NPDES permit was expired and had not yet been reissued. Likewise, the STP's NPDES permit expired in February and was not reissued. Both plants continued to operate without valid permits under an administratively (NU) extended basis. (R. at 10); *See* 40 C.F.R. § 122.6. Consequently, neither is subject to phosphorous loading limits (R. at 10). DOFEC has stated that they plan to implement the phased reduction plan into the facilities' new permits (R. at 10). As a result of this proposal, the Slaughterhouse and the STP have sought "administrative hearings on this proposed requirement based on the cost of compliance." (R. at 10). NU has made no effort to implement BMPs for nonpoint sources, and the nutrient management permits for CAFOs have yet to be modified in the image of the CWIP provisions (R. at 10). Currently, Lake Chesaplain is in stark violation of set WQS (R. at 10).

Procedural history. "Both actions are brought pursuant to the judicial review provisions of the Administrative Procedures Act, APA § 702." (R. at 10). CLW members include individuals who reside near Lake Chesaplain and whose enjoyment of use has been impacted by the declining water quality, satisfying the standing requirement. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.,* 528 U.S. 1167 (2000). NU also has standing to challenge the EPA's rejection of its TMDL and adopt its own because this will require implementation by NU via

NPDES permits. It will also affect NU's eligibility for federal water quality planning funds and maintain the NPDES permitting system. CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2).

SUMMARY OF THE ARGUMENTS

First, the EPA's decision to adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is not ripe for judicial review. Ripeness is a doctrine that requires an administrative decision to be finalized and its effects implemented before a claim can be brought. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). The TMDL adopted by the EPA requires further implementation by the states affected. As such, this Court should find that the claim is not ripe for judicial review.

Second, the EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL was valid on the grounds that the TMDL failed to include wasteload allocations (WLA) and load allocations (LA) and incorrectly interpreted "total maximum daily load" in CWA §303(d). The TMDL needs to include a WLA and LA for phosphorus as adopted in 1985. *See* Final Rule, Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985). Additionally, the TMDL requires allocation of all proposed individual reductions needed to meet that total. *Id*. This court should reject the TMDL put forth by New Union.

Third, the EPA's adoption of a TMDL for the Lake Chesaplain Watershed containing an annual pollution loading reduction, phased in over 5 years, does not violate the CWA § 303(d) requirements for a valid TMDL. A daily load plan is too narrow and does not allow for a realistic approach to annual pollution reduction. Therefore, the meaning of the statute cannot be taken at face value and must be viewed from a subjective standpoint. This court should find that the EPA's TMDL is valid.

Finally, 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 Chesaplian TMDL was not arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation. The EPA had a reasonable basis for its decision, which validates the credit. This court should uphold the District Court's summary judgment.

STANDARD OF REVIEW

The district court's conclusions of law are to be reviewed *de novo*. *United States v. Suarez*, 263 F.3d 468 (6th Cir. 2001). The facts in this case, which the District Court relied upon, are not in question. Rather, the District Court misapplied the law when it misinterpreted the term "total maximum daily load" and found that phased portions of the TMDL violated CWA § 303(d). Therefore, this Court should review the District Court's decision *de novo.*

ARGUMENT

I. The 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 not ripe for judicial review.

Both ripeness issues before the Court are petitions for judicial review under the Administrative Procedure Act, APA § 702 Right of Review regarding judicial review of agency actions (R. at 10). The doctrine of finality states that before agency action can be fit for judicial review, the action at issue must be final. 5 U.S.C. §§ 702, 704. Under the APA, an agency action is final when 1) the action marks the consummation of the agency's decision-making process, and 2) is not merely tentative or interlocutory in nature and is one by which rights or obligations

have been determined, or from which legal consequences will flow. 5 U.S.C. §§ 702, 704; *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

There are two exceptions to the doctrine of finality. The first is futility: if the petitioner is able to prove that awaiting final agency action would be futile, she may be excused. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 618-19, 626 (2001); *Abbott Labs. V Gardner,* 387 U.S. 136, 140 (1967). The second is the arbitrary and capricious standard. When determining the finality of an agency's action or decision, the court may set aside the ruling if it is "arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law." 5. U.S.C. § 706(2)(A); *Sun Towers, Inc. v. Schweiker,* 694 F.2d 1036, 1038 (5th Cir. 1983). This standard is deferential, existing with the purpose of ensuring the agency made no clear error of judgment that could qualify as arbitrary and capricious. *Id.* This standard requires a mere nexus between facts found and the agency's conclusions. *Id; Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs,* 887 F.3d 906 (2017).

The doctrine of ripeness ensures all cases and controversies are fit for judicial review prior to being brought before the Court. The Court provides three factors to consider when determining ripeness: 1) whether there would be sufficient hardship to the plaintiff, if not reviewed; 2) whether the issue seeking review is purely legal (*i.e.,* would not benefit from additional factual development); and 3) whether judicial determination would sufficiently interfere with agency administrative decisions. *Ohio Forestry Ass'n v. Sierra Club.* [*Cite Sierra citing Abbot. Abbott Labs. V. Gardner*, 387 U.S. 136, 140 (1967)].

The final timing requirement for judicial review of agency action requires that a party exhaust all administrative remedies before going to court. 49 C.F.R § 1115.6.

A) The EPA's determination is not ripe for judicial review because there has been no "final agency action".

The District Court incorrectly concluded that the issues before the Court are ripe. The EPA's decision to adopt its own TMDL and implementation plan for Lake Chesaplain is not ripe for judicial review because establishing the Chesaplain Watershed Implementation Plan (CWIP) does not meet the Court's definition of final agency action. *Bennett v. Spear,* 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). CWIP does not mark the consummation of the EPA's decision-making process. *Bravos v. Green,* (2004). At this point in the process, CLW and the state could have appealed directly to DOFEC or the EPA. The action of establishing CWIP is also not one from which rights or obligations have been determined, or from which legal consequences will flow. *Id.* This is shown by the fact that despite not having a current NPDES permit, both the Sewage Treatment Plant (STP) and the Slaughterhouse are continuing to operate pursuant to State blessing under 40 C.F.R. §122.6. While the implementation plan does lay out the obligations of those affecting the water quality standards of Lake Chesaplain, those obligations are not enforceable by the EPA or their plan. (R. at 5). The TMDLs in CWIP can only be implemented by the state of New Union. *American Farm Bureau Federation v. U.S. E.P.A.,* 792 F3d. 281 (3d Cir. 2015). The TMDLs set by the EPA may never be used in their current form to modify the State's NPDES permits. Because of this possibility, the parties will also not suffer hardship should review be denied until the State has implemented the TMDLs in their final form.

B) The EPA's determination is not ripe for judicial review because CLW and New Union have not exhausted all administrative remedies prior to bringing suit.

The doctrine of finality for determining ripeness also requires a party to exhaust all available administrative remedies before seeking federal judicial review. 49 C.F.R § 1115.6;

Yanez v. Holder, 149 F.Supp.2d 485 (N.D. Ill. 2001). If a party fails to do so, the Court may dismiss the action for lack of subject matter jurisdiction. *Id.* In the case at bar, CLW and the State of New Union did not exhaust all administrative remedies before bringing the controversy before this Court. CLW and New Union should have first sought redress through an administrative hearing with DOFEC (the designated state agency in charge of Water Quality Standards, including implementation of TMDLs, BMPs, and the issuance of NPDES permits), just as the Slaughterhouse and STP did (R. at 10). CLW and New Union failed to pursue such remedies and accordingly their petition is not ripe.

II. The 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, is an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

The EPA's rejection of the New Union Chesaplain Watershed's (NUCW) phosphorus TMDL was a legitimate use of their statutory power under the Clean Water Act (CWA) because the NUCW TMDL failed to include wasteload allocations and load allocations. Further, the EPA has the authority to replace an incomplete plan with a plan of their own.

A) The decision that EPA's mandate fails the first prong of the Chevron test is incorrect, defies precedent, and will strip the EPA of its ability to create a TMDL.

In the instant case, the District Court held that the EPA's definition of the phrase TMDL to require WLAs and LAs contradicts the plain meaning of the plain meaning and intention of Congress in enacting section 303(d), and that the regulation 40 C.F.R. § 130(i) is contrary to law under the first step of the *Chevron* test. (R. at 13). For "Step One" of the *Chevron* test, 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." *Chevron v. NRDC*, 467 U.S. 837,

842-43 (emphasis added). Congress did not provide a definition of "total maximum daily load" in CWA section 303(d). CWA § 303(d); 33 U.S.C. § 1313(d). The District Court holds that Congress's omission of a definition is indicative of unambiguous intent to leave implementation of a TMDL to the states, and only allow the EPA to insert single number indicating the TMDL, without any input as to the methods of reaching the total. (R. at 13). The District Court's interpretation runs contrary to the intent of Congress and most prior case law on the subject. Further, the District Court's interpretation will nullify the EPA's ability to create a TMDL.

As the District Court stated, their interpretation of CWA § 303(d) will nullify the EPA's prior definition of TMDL. *Id.* The EPA defines a TMDL as "the sum of the individual WLAs for point sources and the LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i) (2021). As a result of this decision, the EPA has no ability to govern TMDLs under CWA § 303(d). The court is effectively stripping them of their ability to govern TMDLs because of an *omission* of express language from Congress within a statue that grants the EPA the power to regulate the quality of water within the United States. CWA §§ 101-527; 33 U.S.C. §§ 1251-1387. The general rule for interpreting an agency action when the statute is silent is "whether the agency's action is based on a permissible construction of a statute." *Chevron*, 467 U.S. at 843. The court takes the drastic step of saying that the EPA was acting outside of its authority in creating a definition for an undefined term in the statute. (R. at 13). This interpretation runs contrary to Congress's broad intent of creating a statutory scheme that improves and maintains water quality. *See* 33 U.S.C. § 1251(a). Further, the District Court holds that Congress's omission of express delegation of authority to the EPA within CWA § 303(d) is an indication of intent to grant power to the states to implement the TMDL program. (R. at 13). However, Congress granted express power to the states to implement the construction grant program (33

U.S.C §§ 1251 et. seq.) and the permit programs under CWA §§ 402 and 404. CWA § 101(b); 33 U.S.C. § 1251(b). All authority not delegated to the states is given to the Administrator of the EPA to administer the act. CWA 101§(b); 33 U.S.C. 1251(d). The District Court strips the EPA of its ability to carry out its statutorily defined duty to perform obligations prescribed to it by the CWA.

The Supreme Court has held that *Chevron* deference is appropriate when an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03. The Clean Water Act represents this sort of legislation, requiring broad technical expertise and scientific sophistication. The objective of the act is to restore and maintain the chemical, physical and biological integrity of the waters of the United States. CWA §101(a), 33 U.S.C. § 1251(a). Congress granted explicit authority to the EPA Administrator to administer the Clean Water Act. CWA §101(d), 33 U.S.C. 1251(d). Considering the complex task that Congress explicitly granted the EPA Administrator with carrying out, courts should be cautious in holding that the EPA Administrator does not have the ability to define undefined terms within the statute.

Several courts have recognized the EPA's authority to define and regulate TMDLs. *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281 (3d Cir. 2015); *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d. 9, 14 n.8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009). If New Union and the New Union District Court were correct that the statute is unambiguous in its grant of authority to the states, it is departing from the opinions of several other courts on the same topic.

Instead, the District Court relies exclusively on their interpretation of a Supreme Court case in which *Chevron* deference is overruled to grant summary judgement for New Union and

reject EPA's TMDL, while also vacating the EPA's regulatory definition of TMDL. (R. at 14). The District Court misapplies the holding of *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) when it applies it to the facts of the present case. In *Utility Air Regulatory Group*, the EPA was attempting to regulate greenhouse gases under the Clean Air Act (CAA). *Id*. The CAA specifically contains a regulatory program that requires facilities to get a permit if they emit more than 250 tons of a certain pollutant annually (or 100 tons for certain types of sources). 42 U.S.C. §7479(1). The EPA inserted a new threshold of 100,000 tons in order to regulate the largest sources of greenhouse gases without imposing new restrictions that would impact every sector of the economy. *Utility Air Regulatory Group*, at 311. The Clean Air Act contained precise numerical thresholds that it granted EPA the power to regulate. 42 U.S.C § 7479(1). The EPA replaced those numbers *specified in statute* with their own numbers in order to satisfy the policy goals of the executive branch. *Utility Air Regulatory Group* at 326. For that reason, the EPA did more than exercising discretion in light of statutory silence, they clearly went beyond their statutory authority. *Id*.

The situation in the present case is distinct from the case in *Utility Air Regulatory Group*. In the present case, the EPA was compelled to enforce the TMDL program because of citizen suits and court orders. *The Clean Water Act Handbook* (Mark Ryan ed., American Bar Association 4th ed. 2018). In response, the EPA evaluated the TMDL program and issued regulations in response to the growing emphasis on TMDLs. *Id*. at 252. The EPA only acted on the TMDL program when it was compelled to, and then used its expertise and discretion to define statutory terms and issue regulations. This is an entirely different proposition than the EPA's attempt to supplement a statutory provision like in *Utility Air Regulatory Group*. EPA's issuance of regulations to define TMDL and issue regulations are in accordance with the intent

of the Clean Water Act, which gives express authority to the Administrator to carry out the provisions of the CWA. CWA § 101(d), 33 U.S.C. § 1251(d). If the District Court's decision is upheld, the EPA will be unable to carry out the tasks that Congress delegated directly to it when it passed the Clean Water Act.

B) The statutory text of the Clean Water Act supports including levels of pollutant load within the total maximum daily load.

Under New Union and the District Court's reading, "total load" is the only number that should be included, much like the "total" at the bottom of a restaurant receipt. *Am. Farm Bureau Fed'n* at 297. However, this reading makes the word "total" redundant. "Maximum daily load" would enact the exact same meaning that the District Court intends to enact by vacating EPA's prior ruling on the subject. (R. at 13). Applying the canon against surplusage to this part of the statute, it is plausible to understand that within "total," it is reasonable to express the constituent parts of the load. *Am. Farm Bureau Fed'n* at 297.

Congress, in enacting CWA § 303(d), explicitly tells the EPA to establish "total maximum daily loads" at a level necessary to implement the applicable water quality standards, but in no place does it define how EPA is to establish those standards. CWA § 303(d), 33 U.S.C. § 1313(d). By issuing regulations pursuant to CWA § 303(d), the EPA chose to lay out in detail 1) how it arrived at the TMDL it chose; 2) how it thinks it and affected jurisdictions will be able to achieve that number; 3) why that number will reach the allow the body of water to reach the water quality standard; 4) when it expects the TMDL to achieve the applicable water quality standard; and 5) what it will do if the water quality standard is not met. 40 C.F.R. §130.7; *Am. Farm Bureau Fed'n* at 298. The District Court's ruling strips the EPA's ability to perform its duty and, if upheld, will force the EPA to promulgate new regulations that strip the CWA of its enforcement provisions.

III. The EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years does not violate the CWA §303(d) requirements for a valid TMDL.

The District Court held that a TMDL can only be expressed in daily terms, and that by adopted a phased TMDL, the EPA is not adopting a TMDL at the level necessary to assure that water quality standards will be achieved. The court's decision leaves the EPA with an unrealistic and unworkable standard to meet water quality standards. Exclusively allowing TMDLs to be expressed as a daily value is an overly narrow interpretation of the CWA and would prevent the EPA from carrying out its statutory duty.

CWA section 303(d) refers to a "daily" load. CWA § 303(d), 33 U.S.C. §1313(d). EPA's implementing regulations for TMDLs state that TMDLs may be expressed "in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). The Second Circuit agreed with the EPA, holding that a TMDL "may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in water bodies." *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91, 99 (2nd Cir. 2001). The D.C. Circuit Court, however, disagreed in holding that TMDLs could not be expressed in any other language than "daily" because of the unambiguous language within the CWA. *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir., 2006). In response to the *Friends of the Earth* ruling, the EPA issued guidance affirming its position that "daily" is not always the best expression of a TMDL, but "recommends that all future TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments." Memorandum from Benjamin H. Grumbles, assistant administrator, EPA, to region directors, *Establishing TMDL "Daily" Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit* following the decision of *Friends of the Earth, Inc. v. EPA, et. al.*, No. 05-5015

(Apr. 25, 2006) and Implications for NPDES Permits (Nov. 15, 2006). The differing opinions left EPA with significant uncertainty as to the TMDL program. The District Court's decision will make it far more difficult for the EPA to carry out their TMDL program.

In *Friends of the Earth*, the D.C. Circuit Court of Appeals held that TMDLs may only be expressed as a daily number due to Congress's express wording. However, the D.C. Circuit Court has an "exceptionally high burden" to demonstrate absurdity, which is how it distinguishes its ruling from the ruling in *Muszynski*. *Friends of the Earth* at 146.

Instead of adopting an overly formalistic approach to the TMDL program, this court should examine the approach used by the Second Circuit in *Muszynski*. The court looked at the overall structure of the CWA and held that the EPA should be allowed to express pollutant levels by another measure of mass per time, and that restricting EPA to exclusively daily levels would be "absurd." *Muszynski* at 98-99. In the present case, the EPA adopted the most moderate of three proposals, one that would allow the identified polluters time to decrease their phosphorous output without requiring unrealistic and immediate reductions to zero waste. (R. at 9). The rule gives the five identified polluters time to implement new Best Management Practices (BMPs) for the nonpoint sources and stricter permit limits for the point sources. (R. at 9). Plaintiff CLW proposes a plan that sets unrealistic goals and would force one of Chesaplain Mills' largest businesses and the sewage treatment plant to immediately undergo expensive mitigation costs. *Id*. at 10. DOFEC's proposal contains no methods through which annual loading will reach 120 mt. *Id*. at 10. The EPA's plan proposes a reasonable alternative to both plaintiff's plans, one that is consistent with the CWA. *Id.* at 11. To hold that the plan should be rejected simply because it expresses a mass per time that is different than what the plaintiff prefers is an absurd result which should not be entertained by this court. *See Muszynski* at 98-99.

The District Court also determined that the EPA's construction of the phrase "total maximum daily load" is incorrect because the phased reduction in pollutants will not achieve the decline in pollutants required to meet the water quality standards as soon as the plan is implemented. (R. at 15). The District Court claims that their deadline is supported by the deadline of July 1, 1977, that is included in the CWA statute. *Id*. The District Court cites *Bethlehem Steel Corp v. Train,* 544 F.2d 657 (3d Circ. 1976), which upheld the strict deadline in the statute, to support its decision. However, *Bethlehem* refers to an entirely different section in the CWA, the point source pollution sections under CWA §§ 301, 302, and 304, rather than CWA § 303. *Bethlehem* at 661. Further, the timeline that the court states would be necessary for full compliance is July 1, 1977, *two full decades* before the decline in water quality was noticed in Lake Chesaplain. (R. at 7). The water quality standard in Lake Chesaplain *was met* in 1977, it merely declined in the decades after the initial deadline. Strict compliance with this deadline would be impossible since the date is 45 years before the present day. Any plan put forth by the EPA, regardless of the deadline for phosphorus reduction, would be in violation of the deadline. Further, adhering to this policy would negate any reason for the states to monitor and improve the waters of their states, if any plan put forward would immediately be in violation of the date the District Court put forward. *See* 40 C.F.R. § 130.7(d). Following the District Court's holding would put any TMDL plan in instant violation of the CWA. *See* R. at 15. Such an interpretation of the statute will lead to chaos in CWA implementation and absurd results.

IV. 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 not arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

The standard of review for the EPA applying its regulatory standards to the record before the agency is "arbitrary and capricious" and the court cannot substitute its judgment for the

agency. "A decision is arbitrary and capricious if the decision was without reason, unsupported by substantial evidence or erroneous as a matter of law." *Kirk v. Readers Digest Ass'n,* 57 F. App'x 20 (2d Cir. 2003). Agency action has to be set aside if the action was capricious or arbitrary. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). The EPA considered the relevant factors of implementing the 35% reduction in nonpoint phosphorus inputs and the positive effect it will have on the lake (R. at 9). The EPA therefore has a reasonable basis for its decision.

The EPA regulation governing wasteload allocations specifically allows for a credit against the TMDL for loading reductions completed through BMP's. "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. Thus, the TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i). The CLW refused to take credit for the nonpoint source phosphorus reductions, by arguing that the BMPs were not sufficient to reach the required 35% reduction in nonpoint phosphorus inputs (R. at 16). However, EPA regulations for nonpoint sources are "best estimates of the loading which may range from reasonably accurate estimates to gross allotments." EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991)(15).

The CLW claims that there is nothing in the record where the State of New Union intended to require implementation of the BMPs in the CWIP. However, New Union actually abandoned its own BMP plan to establish a plan that simply dealt with total loading and did not include BMP's. The CLW argues that there must be a "reasonable assurance" that reductions will occur, but that is not the standard (R. at 16). The "reasonable assurance" standard has never been adopted by the EPA through the notice-and-comment rulemaking, and therefore has no

merit. The CWA § 303 TMDL is a planning and information program, not one of implementation. *Id*. The EPA's TMDL is there to provide possible BMP's that might help water quality standards; however Congress left the issue of actual implementation and compliance by nonpoint sources up to the states. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).

The District Court found that the EPA's suggestion of nonpoint source BMP use was not arbitrary and capricious, or an abuse of discretion and this court should uphold that summary judgment (R. at 16).

CONCLUSION

Upon the foregoing, Appellant EPA respectfully requests this Court affirm the District Court's partial grant of summary judgment for EPA, reverse the District Court's partial grant of summary judgment for CLW and the State of New Union, and remand for further proceeding consistent with that decision.