Non-Measuring Brief | C.A. No. 21-000123 CONSOLIDATED WITH C.A. No. 21-000124 | Team Number: 50

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellee-Cross Appellant

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

BRIEF OF APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

Both cases are brought under the Administrative Procedure Act, APA § 702. The United States District Court for the District of New Union has jurisdiction to review the case pursuant to 28 U.S.C. § 1331, which grants that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. *See* R. at 10.

This Court has jurisdiction to review the final order of the United States District Court for the District of New Union under 28 U.S.C. § 1291, which provides 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 THE ISSUES

1. Was the district court correct in holding that 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 was ripe for judicial review?
2. Was the district court correct in holding that 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 was contrary to law and an incorrect interpretation of the term "total maximum daily load" in CWA 303(d)?
3. Was the district court correct in holding that the EPA could not approve the New Union Chesaplain Watershed phosphorus TMDL in light of its form as a phased percentage reduction in annual loadings rather than a fixed daily limit on total loadings?
4. Was the district court correct in holding that the EPA did not act arbitrarily and capriciously in approving the New Union Chesaplain Watershed phosphorus TMDL

despite the lack of "reasonable assurance" New Union would implement the Best Management Practices for nonpoint pollution sources?

STATEMENT OF THE CASE

Statement of Facts

Lake Chesaplain is a natural lake located entirely within the State of New Union. It is centered around the Chesaplain National Forest, agricultural lands with several lakefront vacation communities, and home developments on the shoreline. R. at 7. The City of Chesaplain Mills is located at the north end of the lake, where the New Union River flows into Lake Chesaplain. Prior to the 1990s, Lake Chesaplain had great water quality. Under New Union's Water Quality Standards (WQS), Lake Chesaplain is designated as Class AA, which is the highest quality waters of the state. R. at 8. However, throughout the 1990s, ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs), were developed in the Union River watershed, along with a large-scale slaughterhouse and new septic systems. R. at 7. The slaughterhouse on Lake Chesaplain has a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit for a direct discharge into the Union River. Chesaplain Mills' sewage treatment plant (STP) which discharges directly into Lake Chesaplain has a CWA permit. The septic systems and the hog CAFOs are not subject to CWA permit. *Id.*

The combination of these developments and additional discharges led to a visible decline in water quality in the Lake in the 2000s. Algal blooms formed during the summer months, fish productivity declined, swimming became unsuitable, and property values and tourism revenue declined. *Id.* In 2012, the Chesaplain Commission issued a report finding excessive phosphorus levels in the water body. R. at 8. Dissolved oxygen (DO) levels were at unhealthy levels and

odor and water clarity were violating the state's WQS. In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) submitted an impaired water list to the United States Environmental Protection Agency (EPA) and included Lake Chesaplain on the list. *Id.*

DOFEC did not submit a Total Maximum Daily Load (TMDL) for Lake Chesaplain in its submittal to the EPA and, in 2015, Chesaplain Lake Watch (CLW) served a notice letter on both New Union and the EPA threatening to sue based on the failure of either agency to establish a TMDL for the Lake. *Id.* DOFEC then commenced a state rulemaking proceeding to establish a TMDL and the Chesaplain Commission issued a supplemental report in 2016. R. at 9. In 2017, DOEFC publicly noticed a proposal to implement the TMDL through an equal staged reduction in phosphorus discharges by both the point sources and nonpoint sources. This proved highly controversial and the HOG CAFOs objected to the possible imposition of BMPS on their operation, arguing that the EPA lacked the statutory authority to require implementation of loading limits against nonpoint sources. R. at 10. The DOEFC adopted the Hog CAFO's position and adopted a TMDL that did not include any wasteload allocations or load allocations. The EPA rejected the DOEFC's TMDL and after notice and comment, adopted the original DOFEC TMDL proposal. *Id.*

Procedural History

Plaintiff New Union, the State who the EPA has proposed TMDL standards for, filed an action in the United States District Court for the District of New Union on January 14, 2020. Plaintiff CLW, whose membership includes individuals who reside near Lake Chesaplain and use Lake Chesaplain for recreational purposes, filed an action in the United States District Court for the District of New Union on February 15, 2020. *Id.* at 10. The United States District Court for the District of New Union granted unopposed motions to consolidate the two actions on

March 22, 2020, and the EPA lodged the administrative record with the Court on July 1, 2020. *Id*.

The State of New Union and CLW sought to challenge various aspects of the determination of the EPA to reject New Union's proposed TMDL determination for phosphorus loadings in the Lake Chesaplain watershed and to substitute its own TMDL under the Clean Water Act, 33 U.S.C. § 1313(d). 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. In No. 73-CV-2020, CLW sought a declaration that the substantive provisions of the EPA Lake Chesaplain phosphorus TMDL are insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. R. at 11.

The United States District Court for the District of New Union published a decision, *Chesaplain Lake Watch and The State of New Union v. U.S. EPA,* consolidated cases nos. 66-CV-2020 and No. 73-CV-2020 RNR, (D.N.U. August 15, 2021), ruling on all four issues presented *supra*. The district court denied EPA's motion for summary judgment in part, granted CLW's motion for summary judgment in part, and 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. R. at 16.

Following the district court's decision, CLW filed a timely Notice of Appeal, appealing from the district court's decision that 1) that EPA's interpretation of the term Total Maximum Daily Load to include wasteload allocations and load allocations violated Clean Water Act 33 U.S.C. § 1313(d), and 2) that EPA's credit for nonpoint pollution reductions to be achieved through implementation of best management practices (BMPs) to make point source pollution

reductions less stringent, was not arbitrary or capricious or an abuse of discretion based on the record before EPA. R. at 2.

Additionally, the EPA filed a timely Notice of Appeal. The EPA appeals 1) from the district court's order vacating EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and 2) from the district court's determination that phased implementation of an annual percentage reduction TMDL was a violation of CWA 33 § 303(d). *Id.*

On September 1, 2021, this Court issued an Order recognizing the jurisdiction of this Court to hear the appeal and requiring the parties to brief the aforementioned issues. *Id.*

SUMMARY OF THE ARGUMENT

First, 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. The mere proposal of a TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or regulatory actions. The TMDL does not need to be immediately implemented, nor is it for specific NPDES permits as the court states. Rather, it is merely a guideline. There is no legal interest or obligation on the plaintiffs, further factual development would be beneficial for the court, and there is no immediate harm on the plaintiffs.

Second, EPA's decision to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is a correct interpretation of the term TMDL in CWA § 303(d). This is not contrary to

law and the Court was wrong to not give deference to the EPA and to part with the Third Circuit holding in *American Farm Bureau Federation v. U.S. E.P.A.*

Third, The Court should reverse the decision of the District Court in its determination that the EPA's adoption of the TMDL for the Lake Chesaplain Watershed, consisting of an annual pollution loading reduction to be staggered in over five years, violated CWA §303(d). The district court, in its Chevron analysis, improperly isolated the term "daily" and constructed §303(d) in a manner which leads to absurd results. Congress explicitly left ambiguity as to the formulation of TMDLs and the EPA did not act arbitrarily and capriciously in its approval of the CWIP. Even if the court finds that Congress implicitly left ambiguity, the EPA's approval of the CWIP was reasonable.

Fourth, The Court should affirm the District Court's conclusion that the EPA's determination to suggest nonpoint source Best Management Practices (BMPs) as an offset to Point Source Reduction was not arbitrary and capricious or an abuse of discretion. As the District Court acknowledged, "EPA's calculation and load allocations is a matter of EPA applying its regulatory standards to the record before the agency." R. at 15.

ARGUMENT

I. EPA's rejection of the New Union Chesaplain Watershed phosphorus TMDL and decision to implement its own is not ripe for judicial review.

EPA's decision 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. The mere proposal of a TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or regulatory actions. The TMDL does not need to be immediately implemented, nor is it for specific NPDES permits as the court states. Rather,

it is merely a guideline. There is no legal interest or obligation on the plaintiffs, further factual development would be beneficial for the court, and there is no immediate harm on the plaintiffs.

A. Ripeness Doctrine

Ripeness is the doctrine requiring that for a dispute to be subject to adjudication, all necessary administrative actions giving the challenged agency action concrete effect must have been taken. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, (1967). According to the Supreme Court in *Abbott*, the two questions the court considers in evaluating "ripeness" is the 1) fitness of the issues for judicial decision and 2) the hardship to the parties of withholding court consideration. *Id*. at 149.

The first prong requires the court to consider "any institutional interests that either the court or the agency may have for postponing review." *State Farm Mut. Auto. Ins. Co. v. Dole,* 802 F.2d 474, 479 (D.C.Cir.1986). A court has a "legitimate interest in avoiding adjudication of speculative controversies." *Id.* at 479. An issue may be fit for judicial review if it is a "purely legal one." *Id.*; *see also Cement Kiln Recycling Coal. v. EPA,* 493 F.3d 207, 215 (D.C.Cir.2007). However, even some purely legal questions may not satisfy the ripeness test "if postponing review would provide for a more efficient examination and disposition of the issues." *State Farm Mut. Auto. Ins. Co.,* 802 F.2d at 479.

The second prong of the ripeness doctrine requires a court to consider whether delaying judicial review would cause the plaintiff to suffer a hardship that is "immediate, direct, and significant." *Id.* at 480. For instance, a plaintiff may satisfy the hardship prong if they must undertake costly changes in response to an impending TMDL regulation. *Id.* However, if a plaintiff has alleged a "mere potential for future injury" or "if there are too many 'ifs' in the asserted causal chain," then the case is not ripe. *Id*.

B. The TMDL standards are a proposed plan, not a project, and fail the first prong of the ripeness inquiry.

The TMDL standards create no legal rights or obligations on the plaintiffs and postponing review of the actual plan would provide a more efficient examination of the issues. *Id.* Therefore, the first prong of the ripeness inquiry is not met. To support this reasoning, we can look to the Supreme Court's decision in *Ohio Forestry Ass'n, Inc. v. Sierra Club*. The Supreme Court held that the Sierra Club's challenge that the Forest Plan is prone to allow too-much logging is not "ripe". *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 730 (1998). The court found that the plan doesn't actually allow any cutting of trees. Rather, only "projects" approved pursuant to the "Plan" will allow cutting, and these projects had not yet been formulated by the US Forest Service. *Id.* at 730.

Similarly, the EPA has *proposed* to modify each permit to reflect the 35% annual phosphorus loading reduction staged in over five years after permit issuance. A proposal is a plan, not a project. As in *Sierra Club*, the EPA has issued a proposed plan of TMDL standards, but no concrete project. There is a TMDL limit, but there is no specification on *how* this needs to happen or what the permits will specifically entail. The plan accounts for both the nonpoint sources of the hog CAFOs and the point sources of the slaughterhouse and sewage treatment plant. The CWIP did not specify if the stage-out plan would use the same numerical limits each year as DOFEC's original plan or how the proposed BMP measures would be enforced. It is impossible to know what exactly the permit limits will be until BMPs for the hog CAFOs are managed as well

Additionally, the proposal has not been executed into finality and the court would benefit from further factual development of the issues presented. *See City of Arcadia v. U.S. EPA*, 265

F.2d 1142, 1157-1158 (N.D. Cal. 2003). Since TMDLs are not self-executing, but require issuance of state regulations for implementation, delaying review will enable the court to determine more easily and accurately whether the TMDL standards create a financial burden on the Plaintiffs. *Id*. at 1158. We will not know the exact burden or severity of the proposed TMDLs until the proposal is executed into a plan by the State of New Union. This future plan will speak to not only the TMDL limit each year but also the regulation of the BMP nonpoint sources, shedding light on the cost of compliance.

C. The TMDL Standards do not cause immediate injury to the plaintiffs, failing the second prong of the ripeness inquiry.

The TMDL standards will not inflict significant immediate harm on the interests advanced by the State of New Union, hence failing the second prong of the ripeness test. This is a five-year staged out plan. Both the slaughterhouse and sewage treatment plant are currently operating with their old, state-issued permits which require no phosphorus management or the implementation of a septic tank. Likewise, New Union's eligibility for federal water quality planning funds under CWA 33 U.S.C § 1288, as well as its eligibility to maintain its delegated NPDES permitting program, CWA 33 U.S.C. § 1313(e)(2), are not at issue here either. The two latter concerns will come at a much later date, if at all. Plaintiffs provide no evidentiary support for the contention that Plaintiffs must begin employing strategies now. *Id*. at 1157.

Plaintiffs have five years to reach the specified TMDL through a stage-out plan the State of New Union will create and implement. The original DOEFC proposal called for a 7% reduction the first year, a 14% reduction the second, 21% the third, 28% reduction in the fourth, and 35% reduction in the fifth. However, the EPA has not precisely said these numbers are the exact stage-out in their plan. Until then, both point sources have the freedom to operate as is. *See* 40 C.F.R. §122.6.

The cost of compliance is not a burden on the plaintiffs at this point in time. They will have ample opportunity later to bring their legal challenge at a time when harm is more imminent and more concrete. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726. The creation of a TMDL standard is just one part of a multistep process. Plaintiffs will not suffer any immediate hardship in the approval of the TMDL because it imposes no present, affirmative duties on Plaintiffs and requires no immediate changes in Plaintiffs' conduct. The Plaintiffs are free to continue operating under their state-issued permits that do not account for phosphorus or the implementation of septic tanks. Nor will their federal water quality funding and delegated NDPES permitting program be immediately impacted.

Furthermore, the NPDES permit for the slaughterhouse was issued by the State of the New Union, *not* the EPA. Therefore, New Union will need to go through the certification requirements for an EPA issued permit per 40 C.F.R. §124.55. Under CWA 33 U.S.C. §1341, EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate. This certification process is just one example of the hurdles between the TMDL standards and the creation of an actual NPDES permit.

II. EPA correctly interpreted "total maximum daily load" in its determination to reject the New Union Chesaplain Watershed TMDL

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 a correct interpretation of the term TMDL in CWA § 303(d). This decision is not contrary to law. The district court was wrong to not apply deference to the EPA and to part with the Third Circuit holding in *American Farm Bureau Federation v. U.S. E.P.A.* Therefore, the Court should reverse the district court's decision.

A. The district court failed to accurately apply *Chevron* Deference.

In *Chevron, U.S.A., Inc v. NRDC,* the Supreme Court employed a two-part test to review an agency's determination of a statute which it administers. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). In step one, the court examines whether Congress has directly addressed the precise question at issue. *Id.* at 843. If so, that is the end of the matter and the agency must give effect to the unambiguously expressed intent of Congress. If not, the court will move to step two and determine whether the agency's answer is based on a permissible construction of the statute. *Id.* It is undisputed that the term TMDL in CWA § 303(d) is ambiguous, however this was intentional, and the district court's analysis under step two falls short.

The Supreme Court has held that *Chevron* deference is appropriate where an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication. *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339, (2002). Here, the EPA is the scientific expert and authority in TMDL standards. Congress granted the EPA the regulatory authority to not only review state proposed TMDLs, but to also to approve or disapprove of them. *See* 33 U.S.C. §§ 1313(c)(3), (d)(2). If there is disapproval, the EPA has the autonomy to create their own TMDL standards for the state. EPA incorporated the entire record of scientific reports and public comments before the DOFEC. The court's task is not to engage in a "de novo " evaluation of what scientific evidence was before the EPA, but to look instead for whether the EPA engaged in the proper decision-making process, and whether its decision finds support in the record. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9 (1st Cir. 2012) In this case, there is no dispute on the EPA's scientific findings nor what is needed in order to attain New Union's WQS for Lake Chesaplain.

The bottom line in administrative law cases, such as in this case, is that the exercise of resolving interpretive ambiguities in statute or a regulation, is reserved to the administering agency to the extent that it acts reasonably. *See Pine Creek Valley Watershed Assoc. v. U.S. E.P.A.*, 137 F. Supp. 3d 767, 777 (E.D. Pa. 2015). The important point is that Congress created an ambiguity in the CWA language in the first place. The court's role in this order is both to ensure that the EPA does not stray beyond the scope of the delegated power allowing it to exercise its expertise and to ensure that the EPA does not stray beyond norms of consistency and reason when it actually acts on that expertise. *Id*. at 777. Here, the EPA has acted within the scope of ambiguity that the CWA contains and has not strayed beyond its scope. It is irrelevant what the Clean Air Act may say and what omission Congress may have been making in including different language and requirements. Both statutes are incredibly different and complex and need not be compared.

It is less a *Chevron* analysis of what Congress intended "total" to mean, but rather what purpose Congress intended the CWA to have. The CWA aims to prevent, reduce, and eliminate pollution in the nation's water in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251. New Union has failed to develop and issue a particular TMDL for a prolonged period of time and has failed to develop a schedule and credible plan for producing that TMDL. *See Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1211 (9th Cir. 2019). Therefore, it has no longer simply failed to prioritize this obligation; instead, there has been a constructive submission of no TMDL to the EPA, which triggers the EPA's mandatory duty to act. 33 U.S.C.A. §§ 1313(d)(1)(C), 1313(d)(2). *Id*. at 1211. The EPA is simply doing what it must in order to carry out the purpose of the CWA. EPA's imposition of a TMDL implementation plan in the event EPA is dissatisfied with the state's planning process is

completely warranted. New Union has been polluting Lake Chesaplain, a designated Class AA under the New Union WQS, for far too long. There is excessive evidence that phosphorus reductions need to be implemented, but New Union has taken no steps to ensure this nor have they modified their state-issued nutrient management permits. New Union's continuous violations highlight that they should absolutely be getting no deference in this situation, but rather all deference should be assigned to EPA.

B. The court is wrong to part with the Third Circuit ruling in *American Farm Bureau* and other similar caselaw.

EPA's authority in the TMDL process, definition, and regulation has been in place for decades now. While the court here recognizes New Union's ability to bring this as an "applied" challenge to the regulation, they digress from the Third Circuit ruling which speaks to this issue precisely and is analogous to the case before us. The Third Circuit held that TMDL regulations were reasonable and reflected a legitimate policy choice by the agency in administering ambiguous terms. *American Farm Bureau Federation v. U.S. E.P.A.,* 792 F.3d 281, 295-296 (3d Cir. 2015). The court also discussed how 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. If the Farm Bureau were correct that the statute unambiguously supports its reading, we would expect one of the judges who has presided over TMDL litigation to have noticed the disconnect between the statute and the regulation, but there has been none. *Id.* at 296. The meaning of "total" in reference to TMDL and the intention of the CWA has been in place for decades. The court should maintain the status quo and rule the same here.

Other courts have also recognized the EPA's authority to fill the CWA's considerable gaps on how to promulgate a TMDL on a case-by-case basis. *See NRDC v. Muszynski,* 268 F.3d 91, 96 (2d Cir. 2001). In *NRDC v. Muszynski,* the district court decided that "the administrative

record adequately supports EPA's conclusion that, for some combinations of pollutants and waterbodies, different expressions of the total maximum load of a pollutant are optimal," and thus "EPA reasonably concluded that the best expression of the phosphorus TMDL for these reservoirs was in terms of mass per time." *Id*. at 96. As seen here, the EPA is in the position to decide what is best to include in the TMDL. The term "total" is irrelevant, rather "TMDL " as a whole is what must be considered. The EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of CWA § 303(d)(1) waters and TMDLs, especially since the State of New Union has acted negligently. *Id.* Whatever is necessary to ensure this, should be permitted.

Because of the reasons mentioned, the Court should reverse the district court's decision.

III. EPA's approval of the CWIP TMDL's was valid and within its discretion as conferred by CWA 303(d)(1)(C)

The Court should reverse the decision of the district court in its determination that EPA's adoption of the CWIP TMDL for the Lake Chesaplain Watershed, consisting of an annual pollution loading reduction to be staggered in over five years, violated the CWA § 303(d). The Clean Water Act does not prescribe a process, formula, nor method for establishing a TMDL. *See* 33 U.S.C. §§ 1251–1387. Instead, CWA §303 instructs states to identify "impaired waters" and propose loads to the EPA which are "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." U.S.C. §1313(d)(1)(C).

Since EPA approved the CWIP through formal rulemaking, the Court should interpret CWA §303(d)(1)(C) by the standard analysis established in *Chevron v. Natural Resources Defense Council*. 467 U.S. 837 (1984). The Chevron analysis is a two-step process.

First, courts ask "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." *Id.* at 842–43. If the intent of Congress is ambiguously expressed, the agency's interpretations ""are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

The district court's application of the Chevron analysis led it to conclude that no ambiguity existed as to the temporal requirements of a TMDL. The district court read Congress's use of the word "daily" as an indication that pollution loading standards may not be expressed by an annual limit.

Generally, terms contained in CWA §303(d)(1)(C) have been considered ambiguous by courts. *American Farm Bureau Federation,* 792 F.3d 281 (3d Cir. 2015). As aforementioned, in *American*, the court considered whether or not the term "total" within "total maximum daily load" was a term open to interpretation. There is currently no consensus as to the Congressional intent underlying CWA §303(d)(1)(C). However, there exists a longstanding circuit split as to the interpretation of the term "daily" as contained in the phrase "total maximum daily load." This court should adopt the Second Circuit's interpretation of the Congressional intent belying the term "daily" because Second Circuit precedent more accurately applies Chevron deference and the logic underlying the court's interpretation leads to less absurd results.

A. The District Court Improperly Isolated the Term "Daily"

In its interpretation of CWA §303(d)(1)(C) the district court failed to properly apply step one of the Chevron analysis. The Supreme Court has established that "[A] statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). In its attempt to meet this standard while

interpreting the phrase "daily," the district court merely considered the use of one other phrase within CWA §303(d)(1)(C). The district court concluded that "Congress chose the word 'daily to describe the relevant period of pollutant loading...and this choice is reinforced by reference to 'seasonal variations.'" 33 U.S.C. § 1313(d)(1)(C). However, by only considering the use of the phrase "seasonal variations" rather than the entirety of the phrase, section, or statute, the district court improperly constructed the statute. This mistake is similar to the one that the court made in *Friends of the Earth, Inc. v E.P.A.* where the Court of Appeals for the District of Columbia took the term "daily" completely out of context, and even went so far as to claim that "nothing in this language even hints at the possibility that EPA can approve total maximum 'seasonal'...loads." *Friends of Earth, Inc. v. E.P.A.,* 446 F.3d 140, 144 (D.C. Cir. 2006). The court in *Friends of the Earth* was clearly wrong, since the language of §303(d)(1)(C) does not simply "hint" at the possibility of approving seasonal loads, but specifically instructs states and the EPA to establish standards which take into account "seasonal variations." Though the district court in the present case did not go so far as to completely isolate the word "daily" it still failed to fully contextualize its meaning by only focusing on one other phrase within CWA §303(d) rather than contextualizing the section as a whole.

When taken in full context, it is clear that the term "total maximum daily load" is ambiguous and open to a range of meanings. The stated purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. CWA §303(d) is meant to establish the process by which states develop load standards and to provide a basic framework by which the EPA may evaluate these standards. This directive is clear in Congress' conditional language in instructing that the "total maximum daily load" standard applies only to "those pollutants which the Administrator identifies under

section 1314(a)(2) of this title as suitable for such calculation." Congress intended to confer upon the Administrator the ultimate authority as to determining which pollutants were suitable for the calculation of "total maximum daily load." The case for interpreting this direction as ambiguous is even stronger as one continues to read the text of CWA §303(d)(1)(C), which goes on to instruct that "such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety…." 33 U.S.C. § 1313(d)(1)(C). This sentence reveals Congress' intent to set a minimum bar for assessing the sufficiency of proposed load. Congress included both seasonal variations and margin of safety as considerations to be addressed when formulating loads but did not include specific temporal instructions. Based on these context clues and the construction of §303(d)(1)(C), the court should follow the Second Circuit's approach and interpret Congress' use of the phrase "total maximum daily load" to be an expression of "mass per time" which allows whatever "measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

B. The District Court's Interpretation Is Precluded by Absurdity

When constructing administrative statutes, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981). This court should reject the district court's literal interpretation of the phrase "daily" because its interpretation leads to absurd results.

In its construction, the district court considered "seasonal" to be an indication that the use of the term "daily" was a term not open to interpretation. However, to interpret CWA §303(d)(1)(C) as directing the EPA to promulgate all TMDL standards to conform to a daily basis would be absurd. In its justification, the court explained that "Congress chose the word

'daily' to describe the relevant period of pollutant loading...and this choice is reinforced by the reference to 'seasonal variations.'" R. at 14.

However, this logic is backwards. In its attempt to justify its interpretation of CWA §303(d)(1)(C) the court failed to recognize that the implementation of daily standards also does not account for seasonal variations. Setting a uniform daily limit on pollutant discharge would not account for possible seasonal variations, whereas an annual load could factor in the total differing load capacities necessary at different times of the year. A permanent daily load standard would be uniform across seasons and fail to account for the seasonal variation which is a consideration explicitly required by CWA §303(d)(1)(C). Congress could not possibly have meant for CWA §303(d)(1)(C) to direct an impossible standard. Therefore, the use of the phrase "seasonal variations" cannot possibly function as evidence that Congress intended for all loads to be expressed in daily terms. Instead, Congress's use of the words "daily" and "seasonal" as an indication that Congress conferred upon states the power to develop loads at different timelines which "implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). Rather than reaffirming the necessity of "daily" or "seasonal" loads, the use of these two terms in conjunction demonstrates the ambiguity built within CWA §303(d)(1)(C).

Furthermore, the court in the aforementioned case *Muszynski* further recognized the absurdity of a literal reading of "daily" in the context of the purpose of CWA §303(d) and the types of pollutants which Congress intended the EPA regulate. As the court acknowledged, for some pollutants, "'the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences may not occur immediately….for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." 268 F.3d 91, 98-99 (2d Cir. 2001). The *Muszynski* court's interpretation of CWA §303(d)

tends to lead to less absurd results, and therefore the court should take a similar position in its statutory construction.

C. The EPA's approval of the TMDL was not arbitrary and capricious

After establishing that Congress left ambiguity within the statutory text, the next step in the Chevron analysis requires courts to ask whether this ambiguity is implicit or explicit. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. 837, 844-45 (1984).

There is reason to believe that Congress explicitly intended for the determination of "total maximum daily load" to remain ambiguous. Turning to the construction of CWA §303(d) itself, it appears that Congress did intend for the temporal aspect of permits to be ambiguous and conferred this designation to Agencies. CWA §303(d) instructs loads "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety…." 33 U.S.C. § 1313(d)(1)(C). This sentence reveals Congress' intent to set a minimum bar for assessing the sufficiency of proposed load. Congress included both seasonal variations and margin of safety as considerations to be addressed when formulating loads but did not include any specific temporal instructions. Congress's silence on the temporal designation of permits, despite its explicit instructions as to other considerations necessary to formulating loads, suggests that Congress explicitly intended for the Administrator to determine the appropriate timeframe for permits after identifying "those pollutants...suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C).

After finding the ambiguity as explicitly left by Congress, the court should give the EPA's regulatory decision to approve the TMDLs "controlling weight unless [it is] arbitrary,

capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. 837, 845 (1984). The record counters the argument that the EPA made an arbitrary or capricious determination in approving the TMDLs. The EPA properly implemented the TMDLs through formal notice and comment and incorporated the record of scientific reports and public comments into its own record. The EPA also followed its own officially promulgated rules, which allow TMDLs to "be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. §130.2. For these reasons, the EPA did not act arbitrarily or capriciously in approving the CWIP, since it followed the proper regulatory process in approving the TMDLs and defined them by its own promulgated regulations.

D. The EPA's approval of the TMDL was reasonable

Even if the court rejects the argument that Congress explicitly left ambiguity within the statute, the EPA's approval of the CWIP was still reasonable. Under the Chevron implicit intent doctrine, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. 837, 845 (1984). The only question the court should ask in this analysis is "whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." *Id.* In the case at hand, the EPA made a reasonable determination to approve the CWIP.

The district court misinterpreted the EPA's adoption of staged implementation of the CWIP and instead categorized it as "phased implementation" of the CWIP. This distinction is an important one, and one which the EPA has previously clarified that the "phased TMDLs" are appropriate for a scenario in which "there are uncertain loadings from the major land uses and/or limited knowledge of in-lake processes." U.S. Env't Prot. Agency Off. of Water, Memorandum on Clarification Regarding "Phased" Total Maximum Daily Loads (Aug 2, 2006), at 3.

In the case at hand, the staged implementation is not "phased" since it is not based upon a lack of data or information. Instead, EPA's regulatory guidance controlling "staged implementation" should be considered by the Court in assessing its reasonability. According to a 2006 Memorandum issued by the EPA Water Division Director, a staged implementation "determining [the] reasonable period of time in which water quality standards will be met is a case-specific determination." *Id.* at 2. Therefore, the EPA did not unreasonably grant a five-year extension for achievement of water quality standards, but rather approved a staged implementation approach which it has recognized may be "require[d]….particularly if [the TMDLs] include nonpoint sources." *Id.* at 5. For these reasons, the Court should find that the EPA's approval of the TMDLs was reasonable and reverse the decision of the District Court.

The EPA's approval of a staged implementation is also reasonable in light of the EPA's own promulgated rules regarding TMDL formation. As aforementioned, the official regulations adopted by the EPA allow TMDLs to "be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. §130.2(i). The staged implementation of the TMDLs fits neatly within this standard and is therefore further proof that the EPA acted reasonably pursuant to the applicable laws and regulations.

IV. EPA's Determination to Approve Nonpoint Source BMPs as an Offset to Point Source Reductions is Not Arbitrary and Capricious or an Abuse of Discretion

This Court should affirm the district court's conclusion that the EPA's determination to suggest nonpoint source Best Management Practices (BMPs) as an offset to point source reduction was not arbitrary and capricious or an abuse of discretion. As the district court acknowledged, "EPA's calculation and load allocations is a matter of EPA applying its regulatory standards to the record before the agency." R. at 15.

Best Management Practices are defined by the EPA in its official regulations, which state that "[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent." 40 C.F.R. §130.2(i). BMPs are meant to serve as a tool for "nonpoint source control tradeoffs." *Id.* Nowhere in either the Clean Water Act, nor the EPA's official regulations have "reasonable assurance", nor "nonpoint" standards been adopted. Due to this fact, the agency's actions are owed *Chevron* deference, and therefore the Court should only ask whether or not the EPA acted arbitrarily or capriciously in its decision not to require "reasonable assurance" that the CWIP will be implemented by non-point sources.

An agency action or rule is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the district court noted "[n]othing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states." R. at 16. Due to the absence of federal regulation on nonpoint sources, "nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority." *City of Arcadia v. U.S. Env't Prot. Agency*, 265 F. Supp. 2d 1142, 1145 (N.D. Cal. 2003). Therefore, states hold the "primary authority and responsibility for issuing permits and controlling nonpoint source pollution in that state." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002). As the record reflects, The State of New Union does not view the reduction of nonpoint sources as a regulatory requirement, since it "lacked the statutory

authority to enforce BMPs" against non-point sources. R. at 10. If the EPA had approved the CWIP in violation of state laws pertaining to nonpoint sources, it would have acted arbitrarily and capriciously. However, no such laws or regulations exist. There is also no direct evidence that the State of New Union does not intend to enforce the regulations which it suggested to voluntarily implement. Therefore, its decision to approve the CWIP did not fail to consider an important aspect of the problem. Since the EPA's approval of the CWIP without "reasonable assurance" did not violate state nonpoint source laws or regulations, the Court should concur in the District Court's finding that the EPA did not act arbitrarily or capriciously.

CONCLUSION

For the foregoing reasons, this Court should grant EPA's motion for summary judgment and deny CLW's and New Union's motions for summary judgments. The Court should also dismiss both complaints for lacking ripeness, as the Lake Chesaplain TMDL will not have any immediate regulatory effect and its effect will depend on later administrative actions.