Team Number 51

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

v.

UNITED 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 Plaintiff-Appellant-Cross Appellee

Counsel for Chesaplain Lake Watch

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Statement of Jurisdiction

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. The District Court issued an order for the District of New Union on August 15, 2021 in 66-CV-2020 and 73-CV-2020 (consolidated cases), Chesaplain Lake Watch (CLW), the State of New Union, and the United States Environmental Protection Agency (EPA). Each filed a timely Notice of Appeal. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

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 wasteload 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 an annual pollution loading reduction to be phased in over five years violates the CWA § 303(d) requirements for a valid TMDL.
4. Whether EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

Statement of the Case

A. Lake Chesaplain Water Quality

Lake Chesaplain is a natural lake located entirely within the State of New Union. (Record at 7). Lake Chesaplain is bounded by both timber production projects and agricultural lands on its west and east side, respectively. *Id.* Before the twenty-first century, Lake Chesaplain was an attraction to boaters, fishers, and vacationers alike. *Id*. At this time, the lake had excellent water quality conditions. *Id*. At the onset of the twenty-first century, Lake Chesaplain's water quality began to decline significantly due to the introduction of polluting sources along its watershed. *Id*. These polluting sources included concentrated animal feeding operations (CAFO), a slaughterhouse, and a publicly owned sewage treatment plant (STP). *Id*. Lake Chesaplain began experiencing increased levels in algae, decline in fish productivity, and water unsuitable for swimming. *Id*. Property values along the shoreline declined along with tourism revenue. *Id*.

B. New Union's Proposed TMDL

New Union classified Lake Chesaplain as a Class AA water. (R. at 8). That designation includes drinking water source, recreational purposes, and fish survival. *Id*. New Union created the Lake Chesaplain Study Commission in 2008 (the Commission). *Id*. In 2012, the Commission issued a report relating to the declining water quality, finding that Lake Chesaplain was suffering from eutrophication. *Id*. Eutrophication is caused by excessive algae growth, causing a lake to be less biologically productive. *Id.* The excess algae growth was caused by the incredible amount of phosphorus in the water. *Id*. The New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality classification for Class AA waters of 0.014 mg/l in its triennial water quality standards (WQS) review after the Commission's report. *Id*. DOFEC included Lake

Chesaplain on its impaired waters list submitted to the EPA in 2014. *Id*. DOFEC did not submit a total maximum daily load (TMDL) for Lake Chesaplain. *Id*. EPA did not object to the § 303(d) submission. *Id*.

Chesaplain Lake Watch (CLW) served a notice letter to New Union and the EPA based on the failure to establish a TMDL for Lake Chesaplain. *Id*. CLW refrained from the suit as long as New Union, through DOFEC, conducted TMDL rulemaking for Lake Chesaplain. *Id*. DOFEC then commenced state rulemaking to establish a TMDL, in which the Commission issued a supplemental report in 2016. *Id*. The report calculated the maximum loading was calculated at 120 metric tons (mt) annually. *Id*. The existing loading in 2015 was calculated to total 180 mt, with "CAFO Manure Spreading" found to be a significant contributor to the phosphorus loading. (R. at 9). Additionally, the report found that private septic systems were another contributor, along with neither point sources having permit limits for phosphorus. *Id*.

In October 2017, DOFEC issued public notice to implement the TMDL through an equal phased reduction in phosphorus discharges by both sources, ranging over 5 years. *Id*. Point source reductions would be incorporated via permits and nonpoint source reductions would be achieved through a series of best management practice programs (BMP). *Id*. The BMP programs included modified feeds, physical and chemical treatment of manure streams, and restrictions on manure spreading when soil is frozen or saturated. *Id*. Amidst many complaints, CLW contended to the BMP credits for nonpoint source phosphorus reductions, arguing they were insufficient to achieve a 35% reduction in nonpoint phosphorus inputs and New Union lacked the authority to impose such. (R. at 10). CLW demanded the annual reduction be achieved by requiring zero phosphorus discharge from the point sources. *Id*. CLW also contended the phased annual reduction was inconsistent with the Clean Water Act's requirement for a daily limit. *Id*. The

CAFOs argued against both the BMPs and that EPA lacked authority to require implementation of loading limits against nonpoint sources. *Id.*

DOFEC took the CAFOs argument and in July 2018 adopted a TMDL consisting solely of a 120 mt annual maximum, without any wasteload allocations (WLA) or load allocations (LA). *Id*. EPA rejected this TMDL, and in May 2019 adopted the original DOFEC TMDL, including the phased reduction of point and nonpoint sources with permit controls and BMP requirements for nonpoint sources. *Id.* The EPA called this combination the "Chesaplain Watershed Implementation Plan" (CWIP) and it did not specify how the BMP measures would be enforced. *Id*.

CLW, in its affidavits before the District Court for the District of New Union ("District Court"), admitted undisputed additional facts. *Id.* The slaughterhouse NPDES permit expired in November 2018 and had not been reissued and the Chesaplain Mills STP expired in 2019. *Id*. Both plants continue operations under expired permits based on their applications for permit renewal. *Id*. Neither plant is subject to any phosphorus limitation, and both facilities seek administrative hearings based on cost of compliance. *Id*. Since adoption of the TMDL, New Union has done nothing to require phosphorus reduction BMPs by nonpoint sources. *Id*. Lake Chesaplain continues violating water quality standards. *Id*.

C. Procedural History

On August 15, 2021, the District Court found all parties met the standing requirement. (R. at 11). The Honorable Judge Romulus N. Remus presided. The District Court granted summary judgment in favor of New Union, vacating EPA's rejection of the Lake Chesaplain TMDL. (R. at 14). The Court likewise vacated the EPA's regulated definition of a TMDL under

40 C.F.R. § 130.2(i). *Id*. The District Court granted summary judgment to CLW in its challenge to the EPA TMDL relating to the "phased annual" portion of the TMDL. (R. at 15). Finally, the District Court granted summary judgment in favor of the EPA's determination for nonpoint source BMPs. (R. at 16). Following a filing of timely Notice of Appeals, all three parties appealed the decisions of the District Court.

Summary of the Argument

1. The issues before the Court are ripe for judicial review because the issues at hand are purely legal, the TMDL approval is a final agency action subject to review, and the parties will suffer hardship if review is delayed.

2. The District Court erred when it vacated the EPA's denial of the Lake Chesaplain TMDL and by vacating the EPA's definition of "Total Maximum Daily Load". The District Court erred in this determination because the EPA's regulated definition of TMDL was a reasonable construction of an ambiguous statutory term in which an agency is afforded considerable *Chevron* deference. The District Court held that the definition failed under *Chevron* step one, when the statute was clearly ambiguous and left to the determination of an expert agency's discretion. For this reason, the EPA's lawfully promulgated definition required the agency to reject New Union's TMDL for Lake Chesaplain.

3. EPA's construction of the phrase "total maximum daily load" (TMDL) to allow for a phased percentage reduction in phosphorus loadings violates §303 of the CWA and should not receive *Chevron* deference for two reasons. First, the term "daily" is not ambiguous and the statute does not leave this term open to other interpretation. Second, even assuming, arguendo, that the term daily is ambiguous, the EPA failed to provide adequate justification for its actions.

4. The District Court erred in holding that EPA's approval of BMP credits without considering "reasonable assurance" was not arbitrary and capricious, claiming the "reasonable assurance" requirement has to go through notice and comment rulemaking to receive deference. The "reasonable assurance" standard is a general statement of policy not subject to notice and comment rulemaking under 5 U.S.C.A. §553 because it does not have the effect of law, but rather reiterates what is required under the statute. As a statement of policy, it is entitled to *Skidmore* deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). Since the reasonable assurance policy is longstanding and consistent with provisions in the CWA, it passes the persuasiveness of *Skidmore*. Consequentially, by changing their interpretation to not require "reasonable assurance" in this instance, EPA's approval of the BMP credits was without consideration of statutorily required factors and therefore arbitrary, capricious and not in accordance with the law.

ARGUMENT

I. THE ISSUES ARE RIPE FOR JUDICIAL REVIEW.

The initial determination to be made by the Court is whether the issues are ripe for judicial review.

In determining if a decision under the Administrative Procedure Act ("APA") is ripe, the Court must first determine if the issue is fit for judicial review. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). To be fit for judicial review, the matter must involve a final agency action. *Id*. (*See Also*, 5 U.S.C. § 704). Finally, to satisfy the ripeness inquiry, it is necessary to demonstrate that one of the parties would suffer a hardship if judicial review was delayed pending further agency implementation action. *Id.*

A. The issues are fit judicial review.

1. The issues are purely legal.

Here, the facts clearly indicate that the requirements for ripeness are met. As part of its initial analysis regarding ripeness, the Court in *Abbott* found that because the issue before the Court was "purely a legal one" and there were no issues of fact to be determined, the question was fit for judicial review. *Abbott*, 387 U.S. at 149. Similarly in this case, the parties are not asking this Court to resolve any factual dispute; the parties presented their arguments to the district court by way of cross motions for summary judgment. The district court noted that "all of the facts necessary to adjudicate the claims in this case have been developed and are part of the record before EPA." R. at 12. The issues in this case, as discussed *infra*-, are purely legal questions and fit for judicial review.

2. The TMDL is a final agency action.

The requirement that the case involves a final agency action is also satisfied here. It is important that the agency action is final to prevent courts from becoming prematurely involved in tentative agency decisions. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The courts may only become involved if the action is one by which "rights or obligations have been determined," or from which "legal consequences will flow" *Id*. at 178. The EPA's determination in this case is a final agency action fit for judicial review.

The EPA issued the TMDL after considering and rejecting the DOFEC's July 2018 TMDL and after providing notice and opportunity to comment. This case does not involve a case where the Court might become entangled in a preliminary determination. This is a final decision

in which the TMDL has been established. It is a decision having legal consequences if the parties do not comply.

B. The parties will suffer hardship if judicial review is delayed.

Finally, the second prong of the ripeness inquiry is satisfied here. The EPA contends that the adoption of a TMDL does not have any impact on the parties until it is incorporated into specific permits or other regulatory actions, and is thus, not a final agency action until this incorporation occurs. The court in *American Farm Bureau Fed'n v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015) found to the contrary. In *American Farm Bureau*, the court found that "Although the TMDL has yet to be incorporated into a state's continuing planning process and enforced against any individual plaintiff, members of the trade associations will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation. And it would impose hardship on the EPA and states not to hear this dispute now because they are poised to spend more time, energy, and money in developing implementation" *Id*. at 293.

In this case, the TMDL includes specific NPDES permit limits which must be implemented immediately. If the Court were to delay review, the parties would experience hardship by spending "time, energy, and money" to develop an implementation plan to comply with the TMDL which may be later modified by a Court. Thus, this Court should follow the holding set forth in *American Farm Bureau,* where the anticipation of the TMDL's implementation was found to be fit for judicial review and that delaying review would result in a hardship to the parties.

In a desperate search for relevant case law to support its position, the EPA argues that this Court should follow the rulings set out in *City of Arcadia v. U.S. EPA,* 265 F. Supp. 2d 1142

(N.D. Cal. 2003), and *Bravos v. Green*, 306 F. Supp. 2d 48 (D.D.C. 2004). However, the facts of those cases differ drastically from the facts in this case. The courts explicitly noted that the challenges being brought in those cases were not challenges of final agency actions, but rather the procedure. "Plaintiff here, in a similar fashion [to Plaintiff in City of Arcadia], does not challenge the EPA's final action, i.e., the approval of the TMDL limits, but the procedure employed by the EPA to reach its final decision to approve the State's TMDLs, which included the review, but not the approval, of the State's implementation plan." *Bravos*, 306 F. Supp. 2d at 56. There is not a challenge of procedure in this case, the plaintiffs are challenging specific NPDES permit limits for the point source discharges, a final agency action. Thus, these cases are inapplicable in deciding this case.

The issue before this Court clearly meets the test set forth by the United States Supreme Court in *Abbott*, requiring that the issue is both fit for judicial resolution and would cause hardship to one of the parties if review is delayed. Further, it is clear that the test to determine a final agency action from *Bennett* is also met. The facts of this case are analogous to those before the court in *American Farm Bureau*. The Court should follow the holding set forth in that case, rather than following the determination set forth in *City of Arcadia* and *Bravos* which were based on dramatically different facts. The issue is ripe for judicial review.

II. THE DISTRICT COURT ERRED BY VACATING THE EPA'S DENIAL OF THE LAKE CHESAPLAIN TMDL AND VACATING EPA'S DEFINITION OF "TOTAL MAXIMUM DAILY LOAD."

A. EPA's determination to deny New Union's Total Maximum Daily Load for Lake Chesaplain was based appropriately on EPA's reasonable interpretation of § 303(d) of the Clean Water Act.

EPA acted within its statutory authority when it denied New Union's TMDL for Phosphorus for not including wasteload and load allocations because § 303(d) is ambiguous and EPA's regulated requirements for a TMDL are a reasonable construction of that statute. Courts have routinely held that taken together, the entire term "total maximum daily load" is ambiguous. *American Farm Bureau*, 792 F.3d at 297 (stating, "Mindful of agencies' considerable power under complex statutory regimes like the Clean Water Act, coupled with courts' consistent determinations that 'total maximum daily load' is ambiguous."). Under the long-standing *Chevron* doctrine, an agency is afforded considerable deference whenever Congress has left terms in a statute to be ambiguous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984).

To achieve Congressional goals of the CWA under 33 U.S.C. § 1251, it is imperative that the EPA is afforded deference through their expertise in determining what must be required in a state's proposed TMDL. Further, New Union itself has determined that Lake Chesaplain is a body of water that requires the utmost protection when the state listed the lake as a Class AA body of water under the CWA listing requirements. 33 U.S.C. § 1313(d)(1)(A). The District Court erred in vacating EPA's denial of New Union's TMDL for Lake Chesaplain for lacking WLA and LA for phosphorus and vacating the EPA's definition of "total maximum daily load" because (1) the statutory definition of Total Maximum Daily Load is ambiguous, and the EPA has reasonably interpreted the statute under the *Chevron* doctrine; and (2) EPA's decision to deny New Union's TMDL for Lake Chesaplain is a reasonable use of discretion by the agency.

1. The statutory definition of Total Maximum Daily Load is ambiguous and the EPA has reasonably interpreted the statute under the *Chevron* doctrine.

The District Court erred when it vacated the EPA's regulatory definition of "total maximum daily load" because the statute is clearly ambiguous and under a *Chevron* analysis, the EPA's interpretation is reasonable by means of the agency's expertise under *Chevron* deference.

Chevron analysis is completed in two-steps. First, the Court must ask whether Congress' intent within the statute is clear, if it is, the analysis stops there and Congressional intent controls. *Chevron*, 467 U.S. at 843. If the Court finds that the statute is ambiguous, the Court must then determine whether the agency has reasonably constructed or interpreted the statute. *Id*. In this second step, the agency is granted a great deal of deference as an expert in the laws they are congressionally obliged to carry out, "This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *United States v. Shimer*, 367 U.S. 382 (1961).

The District Court held that the "EPA's interpretation of the phrase 'total maximum daily load' to require allocation of all of the proposed individual reduction needed to meet that total runs counter to both the meaning and context of CWA § 303(d)." (R. at 13) The District Court came to this conclusion by stating the relevant portion of the statute, "… implies that the process of setting the TMDL was meant to include an allocation and limitation process of point and nonpoint sources, which is addressed in other sections of the CWA." *Id*.

The CWA was enacted with the EPA being assigned the duty, as Congress' agency of choice with expert knowledge in the field, to carry out its provisions. See *e.g. Chevron*, 467 U.S. at 865. There is no strict definition of "total" within the relevant portions of the statute. Since the enactment of the CWA, Congress has declined to define "total maximum daily load", let alone define "total", by amendment. *See* 33 U.S.C. § 1313. This could only mean Congress meant to leave the issue to the expertise of the agency, or that Congress is content with EPA's efforts in defining a TMDL. "When the agency interpretation faithfully fills the gap that Congress created, we move to Step Two, where we do not ask whether it is the best possible interpretation of Congress's ambiguous language. Instead, we extend considerable deference to the agency and inquire only whether it made 'a reasonable policy choice' in reaching its interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) When the EPA promulgated 40 C.F.R. 130.2(i), the agency made a reasonable policy choice centered around the goals and objectives set forth by Congress when passing the CWA. The EPA has rationally defined the term "total" to include WLA and LA that are admissible in a given body of water. The construction of the statute is, at worst, a slightly more stringent standard that ultimately reaches the goals in enacting the CWA.

The District Court did not look for a definition provided by Congress, or any attempts to look at the legislative history or any congressional reports. Instead, the District Court looked at other portions of the Clean Water Act and essentially replaced the determination of an expert agency with their own personal judgment. (R. at 13). The District Court reasoned its conclusion on the plain meaning and intention of Congress, though it never looked into any intent or any plain meaning. *Id*.

The District Court then looks at the Clean Air Act (CAA), an entirely separate act of Congress, admittedly to achieve goals similar to the CWA, and states that EPA's inability to perform allocations or fill in TMDL's on state's behalf is an intentional omission by Congress to defer to states, rather than the agency. *Id*. Congress did not draft the CWA through a bipartisan effort to direct the states to be in control of protecting water quality with the EPA having no say in what TMDL is put into effect. EPA is not to draft their own TMDLs for the states, but instead give states the opportunity to create their own, with the EPA acting as a check to ensure it complies with federal standards.

The CWA requires that states must submit TMDLs in accordance with pollutants the Administrator finds suitable for calculation. 33 U.S.C. § 1313(d)(1)(C). New Union's TMDL excluded WLA and LA for phosphorus, decided by the Administrator to be a pollutant suitable for calculation, and is in fact contrary to the statute itself. *Id*, 33 U.S.C. § 1314(a)(2). New Union classified Lake Chesaplain as Class AA, its highest protected tier for the state's waters. New Union excluding WLA and LA for phosphorus is contradictory to their own classification. (R. at 8) Excluding WLA and LA for phosphorus makes the TMDL lack specificity that TMDLs require to clean and maintain water quality standards. TMDL's are known as the "technical backbone" for restoring and protecting the nation's waters. Michael M. Wenig, How "Total" Are "Total Maximum Daily Loads" ?-Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act, 12 Tul. Envtl. L.J. 113 (1998). In the Administrator's expert discretion through the agency's long-standing definition of TMDLs, reasonably constructed under the ambiguous statutory definition for TMDL, New Union's.

The *Chevron* Court stated, "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. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" *Chevron,* 467 U.S. at 843-844. When a court is analyzing under *Chevron* analysis, they are ensuring that the agency action is not obviously in contrast to Congressional intent. The EPA was woefully aware of Congressional intent when regulating its definition for "total maximum daily load". The EPA, with its expansive knowledge of environmental issues, understood a simple summation of a pollutant for "total" was not enough to protect the nation's waters. Therefore, the EPA understood the necessity for wasteload and load allocations, or the goals of the CWA would not be accomplished. Because there is no basis for overturning the EPA's decision, the District Court's *Chevron* analysis is its own construction of an ambiguous statute, and the court substituted that judgment over EPA's expert judgment.

2. EPA's decision to deny New Union's TMDL for Lake Chesaplain is a reasonable use of discretion by the agency.

The District Court erred in vacating the EPA's rejection of the Lake Chesaplain TMDL because the proposed TMDL did not sufficiently meet the goals of the CWA and EPA's reasonably founded regulations by excluding WLA and LA for phosphorus. The decision to vacate the EPA's determination to reject New Union's TMDL was based solely on the grounds that the rejection was for the exclusion of WLA and LA for phosphorus. TMDLs are much more than an "information gathering provision" as the District Court suggests. (R. at 13) A TMDL is the basis, the framework, or "technical backbone" used under the CWA. A TMDL does gather information, but this information needs to be precise and accurate, and must include WLA and LA, in order to achieve the goals Congress set forth under 33 U.S.C. § 1251.

Since 1985, the EPA has set the definition and requirements for a TMDL. 40 C.F.R. § 130.2(i). As has been established, this rule has been promulgated under the broad discretion afforded to the agency under the CWA. The EPA has defined a TMDL as: "The sum of the *individual* WLAs for point sources and LAs for nonpoint sources…" *Id.*

TMDLs are forward looking. Wenig at 108. WLA and LA applications are used in the permitting process as well as being a major factor in other processes of a TMDL. Water Quality Planning and Management, 50 FR 1774-01. If this weren't enough, WLA and LA have been relied on for nearly four decades in administering the aforementioned. This is not anything shocking to New Union, yet they decided to leave out phosphorus WLA and LA. EPA was therefore rightful to act on decades of precedent to reject the TMDL.

Affirming this view was the Third Circuit in 2015, stating, "The lawsuits of the 1990s were followed by the actual drafting of thousands of TMDLs, which the EPA has described as 'the technical backbone' of its approach to cleaning the Nation's waters." *American Farm Bureau*, 792 F.3d at 291. Like many federal environmental laws, it takes an extensive amount of time to put the programs forward to accomplish its goals. The EPA has put in nearly half a century of effort to put TMDLs in a position in which the agency and the states may move forward. Wenig at 105. Amidst the forty-years of precedent, the simple request that WLA and LA be added for a listed pollutant such as phosphorus was deemed "contrary to law" by the District Court, when it has been the law for decades. *See* 40 C.F.R. § 130.2. In another sense, this requirement for WLA and LA to be included in TMDLs harms neither party in the end. The permitting process revolves around the inclusion of WLA and LA, it better reflects the goals of the CWA set forth by congress, and it sets a solid foundation for future remediation and protection for Lake Chesaplain.

The Third Circuit best understood this approach in the *American Farm Bureau* decision. "TMDL sets the basis for how water quality is to improve in the future and present. Not describing certain load allocations would complicate this process, defeating the goals and intention of a bipartisan Congress' work to pass the Clean Water Act." *American Farm Bureau,* 792 F.3d at 281. The facts of this Third Circuit case are akin to the case at hand. The issue with the present TMDL lies with the agricultural sector, "Ultimately, DOFEC adopted the Hog CAFO's position and, in July of 2018, adopted a TMDL that consisted solely of a 120 mt annual maximum, without any wasteload or load allocations." (R. at 10). In *American Farm Bureau,* the plaintiffs were agricultural interest groups, upset with the load allocations as being a regulatory expanse of EPA's jurisdiction. *American Farm Bureau,* 792 F.3d at 292. The Third Circuit recognized the grave stakes of overturning the EPA's definition of a TMDL and agreed with the promulgation of WLA and LA allocations. Notably, the Court correctly states, "Moreover, Congress's delegations to the EPA under the Clean Water Act are not limited to occasional ambiguous words; instead, Congress granted broad regulatory authority to the EPA, charging that, '[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA]... shall administer this chapter.' 33 U.S.C. § 1251(d)." *American Farm Bureau*, 792 F.3d at 297.

The EPA rejected the New Union TMDL under their longstanding definition of what is required by TMDLs, WLA and LA applications. This process is used for permitting and further water quality management by the states in conjunction with the EPA. *See* Water Quality Planning and Management, 50 FR 1774-01. By rejecting the New Union TMDL, the EPA acted under their Congressionally authorized regulatory jurisdiction, maintaining Congressional goals and long-standing precedent in cleaning up the nation's waters.

III. AN ANNUAL POLLUTION LOADING REDUCTION TO BE PHASED IN OVER FIVE YEARS VIOLATES THE CWA § 303(d) REQUIREMENTS FOR A TMDL.

The third issue before the Court is whether 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 violated the CWA § 303(d) requirements for a TMDL. As part of this analysis, it must also be determined if the word "daily" as used in the CWA § 303(d) is ambiguous and can be interpreted to mean a measure other than daily.

A. The term "daily" is unambiguous.

The Court must begin with an analysis under *Chevron*. *Chevron* sets forth the standard for judicial review of an agency's construction of a statute. Under *Chevron,* if a court is to review the construction of a statute, the court is confronted with two questions. *Id*. at 842. First, the court must determine if "Congress has directly spoken to the precise question at issue." *Id*. If the statute is unambiguous, and Congress's intent is clear, the court need not proceed any further in its analysis, and the court and agency must give effect to Congress's expressed intent. *Id*. at 842-43. On the other hand, if Congress has not directly addressed the question at issue, the reviewing court must consider whether "the agency's answer was based on a permissible construction of the statute." *Id*. at 843. If Congress has left either an explicit or implicit gap, it is then within the authority of the agency to fill and clarify that gap by implementing regulation. *Id*. at 843-44.

Here, the first step of the *Chevron* analysis clearly determines this issue. Beginning with the statute's language: "[e]ach state shall establish... the total maximum daily load, for those pollutants which the Administrator identifies... as suitable for such calculation." 33 U.S.C. §

1313(d)(1)(C). This exact provision was addressed in a case with strikingly similar facts by the District of Columbia Circuit Court of Appeals in *Friends of Earth, Inc. v. E.P.A.,* 446 F.3d 140 (D.C. Cir. 2006).

In that case, the court held that Congress's use of the word "daily" was not ambiguous whatsoever. The court stated that "[n]othing in this language even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads." *Id*. at 144. The court further held that 33 U.S.C. § 1313(d)(1)(C) explicitly says "daily" and that there is nothing ambiguous about that command. *Id*. The court then turned to the most straightforward way to determine the meaning of a word, the dictionary. "'Daily' connotes 'every day.' *See Webster's Third New International Dictionary* 570 (1993) (defining 'daily' to mean 'occurring or being made, done, or acted upon every day'). Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of '[g]ive us this day our daily bread' as a prayer for sustenance on a seasonal or annual basis. Matthew 6:11 (King James)." *Id*. The court went even further finding "[i]f Congress wanted seasonal or annual loads, it could easily have authorized them by calling for 'total maximum daily, seasonal, or annual loads.' Or by providing for the establishment of 'total maximum loads,' Congress could have left a gap for EPA to fill. Instead, Congress specified 'total maximum daily loads.' We cannot imagine a clearer expression of intent." *Id*.

B. Assuming, arguendo, that the term daily is ambiguous, the EPA failed to provide adequate justification for its actions.

While CLW contends the ruling in *Friends of Earth* is clear and on point, CLW acknowledges there are courts which have found the word "daily" is ambiguous and have moved to the second step of the *Chevron* analysis.

The Second Circuit in *NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001) moved to the second step of the *Chevron* analysis when considering the same provision of the CWA. That case also has similar facts to the facts of this case. In *NRDC*, the Second Circuit determined that "[t]he CWA calls for establishment of a 'total maximum daily load,' not an hourly, weekly, monthly, or annual load. We believe, however, that the term 'total maximum daily load' is susceptible to a broader range of meanings. Indeed, NRDC's overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA." *Id*. at 98. It is crucial to recognize that the Second Circuit did not simply state this and move on. Rather, the court later specified that it did not find "adequate reasons in the record before us to explain why phosphorus is best regulated by TMDLs expressed in terms of annual loads." *Id*. at 103. Thus, the court remanded the case for "the EPA to justify how the annual period of measurement takes seasonal variations into account." *Id*. at 99.

In comparing the justification required in *NRDC* to the facts of this case, the record before this Court shows no indication whatsoever that the EPA has justified how it has taken the seasonal variations into account. The maximum loading in this case was calculated at 120 metric tons (mt) annually. R. at 8. The EPA gave no explanation as to how that number takes seasonal variations into account, as required by the court in *NRDC*. It was simply proposed that the reduction in phosphorus discharges be phased in over a period of five years. R. at 9. The record does not indicate that the EPA gave so much as a thought, let alone an explanation, as to why

this five-year plan was adequate. Nor does the record suggest that the EPA has justified how the annual measurement accounts for seasonal variations.

The Third Circuit further addressed the Second Circuit's ruling that the CWA is ambiguous in its use of the word "daily" and held that the EPA has the authority on how to promulgate a "total daily maximum load" pursuant to the second prong of *Chevron*. *American Farm Bureau*, 792 F.3d at 296. The court held that "[a]lthough Congress explicitly required the EPA to establish "total maximum daily loads," it nowhere prescribed how the EPA is to do so." *Id*. at 298. "[T]he APA likely requires the EPA to provide sufficient information in connection with the TMDL for the public adequately to comment on the agency's judgment and to make suggestions where appropriate." *Id*. The court went on to state that the "EPA would fall afoul of this requirement if it published only a number with no supporting information, as the public would be unable to comment on the number without knowing whether or how the EPA thought such a level of discharged pollutant could be achieved." *Id*. In order to provide sufficient information in connection with the TMDL for the public to adequately comment, the EPA laid out in detail "(1) how and why it arrived at the number it chose; (2) how it thinks it and affected jurisdictions will be able to achieve that number; (3) why that number is 'necessary to implement the applicable water quality standard [],' *Id.* § 1313(d)(1)(C); (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." *Id*.

The facts of this case can be distinguished. While the court in *American Farm Bureau* found that the TMDL did not violate the CWA, it did so because the EPA provided detailed steps as to how it reached the TMDL. *Id*. Here, the EPA has not provided detailed steps as to how it reached the TMDL. Of the five (5) justifications for the TMDL that the EPA provided in

American Farm Bureau, it has only provided one (1) of them in this case. The EPA has not (1) explained how and why it arrived at the number it chose; (2) how it thinks the affected jurisdictions will be able to achieve that number; (3) why that number is "necessary to implement the applicable water quality standard" 33 U.S.C. 1313(d)(1)(C); or (5); what it will do if the water quality standard is not met. The only detail which the EPA has provided is (4) when it expects the TMDL to achieve the applicable water quality standard. R. at 9.

The EPA's interpretation of the term "total maximum daily load" clearly violates Congress's intentions set forth in CWA § 303(d). Following the Supreme Court's precedent in *Chevron*, the term "daily" is intended to mean "daily." If this Court gives the EPA the benefit of the doubt and moves to the second step of the *Chevron* analysis, the EPA has provided no justification for how its annual measurement will account for seasonal variations as required by the APA or otherwise provide the details necessary to allow for meaningful public comment.

IV. EPA'S APPROVAL OF BMP CREDITS WAS ARBITRARY AND CAPRICIOUS BECAUSE THEY FAILED TO CONSIDER RELEVANT FACTORS THAT ARE STATUTORILY REQUIRED.

A. The cases cited by the district court are inapposite to the case at bar.

The district court claimed that the "reasonable assurance" standard for approving BMP credits receives no deference because it has never been adopted by the EPA through notice and comment rulemaking. To support this claim, the court asserted that the "TMDL program is a planning and information program, not an implementation program," and, "nothing in the CWA requires actual implementation and compliance by nonpoint sources, which Congress left optional to the states," citing *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002), and

City of Arcadia, 265 F.Supp.2d at 1144-45. However, these cases are inapposite to the case at hand and neither supports the claim that "*nothing* in the CWA requires actual implementation and compliance by nonpoint sources." *Id.*

In *Meiburg*, the parties had entered into a consent decree that stated, "if Georgia failed to establish TMDLs, EPA was required to do so," and defined a TMDL as having the meaning provided at § 1313 of the CWA and 40 C.F.R. 130.2(i). 296 F.3d at 1029-1030. EPA established TMDLs, but the district court ruled that the decree also required EPA to develop implementation plans as part of EPA's requirement to set the TMDLs. *Id.* at 1027-1028. A threshold jurisdictional question for the Court of Appeals was whether this holding modified the injunctive relief the decree provided or interpreted it. Id. at 1028.

The Eleventh Circuit found the district court ruling to be a modification of the consent decree because, "an implementation plan is a formal statement of how the level of [a] pollutant can and will be brought down to or kept under the TMDL," and "[n]either the referenced statutory provision nor the referenced regulation includes implementation plans within the meaning of TMDLs." *Id.* at 1030-31.

Meiburg is very fact specific and focuses on the authority to develop implementation plans, not the relevant factors EPA must consider when *approving* state management plans. Further, there is a fundamental difference between the "implementation plan" in *Meiburg* and the "reasonable assurance" standard at issue in this case. Here, there is no argument for a specific implementation plan. Instead, CLW argues that EPA cannot take credit for LA reductions anticipated from the implementation of BMPs for nonpoint sources where the state has not demonstrated "reasonable assurance that nonpoint source controls will be implemented and

maintained." EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991). Requiring "reasonable assurance" does not redirect implementation authority to EPA or impede on the state's authority to decide *how* TMDLs will be implemented; it simply provides that EPA must review the state's nonpoint source management plan to assess whether their BMPs are achievable before approving reduced wasteload allocation permits for point sources in the watershed. In fact, the court in *Meiburg* acknowledged this discretionary duty of approval as part of the TMDL process: "States also have to prepare a management program that identifies 'best management practices and measures' to reduce pollution. *Id*. at § 1329(b). EPA exercises authority over these programs and must approve them." *Meiburg*, 296 F.3d at 1026.

City of Arcadia characterizes TMDLs similarly to the district court in its holding. "TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing." *City of Arcadia,* 265 F.Supp.2d at 1144. However, this characterization of TMDLs is irrelevant to the issue at hand. The *City of Arcadia* case addresses EPA's authority to approve state-submitted TMDLs when EPA has already created its own; it does not address whether or how EPA can approve of management plans that allot credits for nonpoint pollution reduction. Though the courts in both *Meiburg* and *City of Arcadia* did hold that the CWA puts the responsibility for implementation of TMDLs on the states, as the district court here asserted, they did not suggest that nothing in the CWA requires actual implementation and compliance by point sources. *Meiburg,* 296 F.3d at 1021; *City of Arcadia,* 265 F.Supp.2d at 1152. And, as addressed above, requiring "reasonable assurance" does not redirect implementation authority to EPA or impede on the State's authority to decide *how* TMDLs will be implemented.

B. The district court erred in holding that the "reasonable assurance" requirement receives no deference because it is a statement of policy entitled to *Skidmore* deference.

1. **The reasonable assurance requirement is a valid policy that has been recognized by multiple courts.**

While no court opinion has explicitly stated that "reasonable assurance" is a longstanding general statement of policy, many courts have recognized that the reasonable assurance requirement is a valid part of the TMDL approval process. (*See Sierra Club v. State Water Control Bd*., 898 F.3d 383 (4th Cir. 2018); *In re 401 Water Quality Certification*, 822 N.W.2d 676 (Minn. Ct. App. 2012); and *Bravos v. Green*, 306 F. Supp. 2d at 52.). Further, in *American Farm Bureau*, where the court upheld the validity of requiring reasonable assurance, they included a footnote that stated, "[t]he court is cognizant that broad *policy* declarations cannot be used to justify every action. . . . [n]evertheless, . . . any action that is consistent with *policy* declarations and otherwise lawful should be upheld," suggesting they recognized this standard as a general statement of policy. 984 F.Supp.2d at footnote 22 (M.D. Pa. 2013)(emphasis added).

In *American Farm Bureau*, the controversy arose after the EPA published the 2010 Chesapeake Bay TMDL to comply with the Clean Water Act. 984 F.Supp.2d 289. "The EPA developed the Chesapeake Bay TMDL in reliance on these plans (states' watershed improvement plans) and did so only after approving the pollutant limitations and concluding that each state had given 'reasonable assurance' of actually meeting the targets in its Watershed Improvement Plan." *Id*. at 291. The Farm Bureau sued the EPA asserting, among other claims, that the EPA exceeded its statutory authority by requiring "reasonable assurance" from the states in drafting

that document. Farm Bureau's argument seems similar to what the district court in the present case was alleging, claiming that the "reasonable assurance" requirement would serve to unlawfully insert EPA into TMDL implementation. *Id.* at 325.

The *American Farm Bureau* court was unconvinced that the "reasonable assurance" requirement related to implementation.

> [T]he mere practice of setting a standard upon which the proposed allocations are judged is not, by itself, implementation. The standard does not require the states to undertake any particular implementation effort. *Rather, the court finds that the "reasonable assurance" standard was an attempt by EPA to clarify the basis upon which the proposed allocations are judged*.
>
> *Id.* at 326 (emphasis added).

Furthermore, the court acknowledged that "a TMDL is an informational document, not an implementation plan," as both the district court in the case at bar and the court in *City of Arcadia* asserted. *Id.* However, unlike the district court in the present case, the *American Farm Bureau* court found this definition to not only be compatible with "reasonable assurance", but supportive of their decision to uphold the "reasonable assurance" requirement. They concluded that, "the reasonable assurances requirement helps to inform the TMDL writer of the proper setting of pollutant allocations so that the TMDL equation is properly budgeted," and explained:

> The WLAs contained in an ineffectual TMDL will themselves be ineffectual and will therefore be useless as a NPDES permitting guide. On the other hand, where EPA determines reasonable assurances exists, greater loadings can be allocated to point sources. Thus, the requirement of reasonable assurances allows a TMDL writer to decide *how* to apportion loadings between point and nonpoint sources under the TMDL cap.
>
> *Id.*

The Third Circuit Court of Appeals affirmed their ruling, stating that, "[e]stablishing a comprehensive, watershed-wide TMDL - complete with . . . reasonable assurance that it will actually be implemented - is reasonable and reflects a legitimate *policy* choice by the agency." *American Farm Bureau*, 792 F.3d at 309.

It is important to note that the US Supreme Court declined to review the decision after the American Farm Bureau had sought review and reversal of the Third Circuit decision, allowing the Third Circuit ruling to stand as the final decision in the case. Doc. No. 15-599.

Beyond *American Farm Bureau*, numerous other cases have acknowledged the "reasonable assurance" requirement as a part of EPA's approval process, supporting CLW's claim that the reasonable assurance is a longstanding general statement of policy. (*See Sierra Club v. State Water Control Bd*., 898 F.3d 383 (4th Cir. 2018); *In re 401 Water Quality Certification*, 822 N.W.2d 676 (Minn. Ct. App. 2012); and *Bravos v. Green*, 306 F. Supp. 2d at 52.)

2. The reasonable assurance requirement is a policy not subject to notice and comment rulemaking because it has no legal effect.

To distinguish legislative rules (subject to notice and comment rulemaking) from general statements of policy, an agency's statement must be assessed by its actual legal effect (binding norms test). (See *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014). For this assessment, it is relevant to inquire whether the agency is relying on the terms of the policy itself to support its actions, or if the policy is pointing to an independent substantive statute or regulation that constitutes the underlying binding norm. If the latter is true, and the policy itself does not create binding norms, then it is presumed to be a general statement of policy. *Nat'l Min.*

Ass'n v. McCarthy, clarifies this for policy statements concerning an agency's discretionary duties:

> An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule. An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.
>
> 758 F.3d 243, 251–52 (D.C. Cir. 2014)

Here, the "reasonable assurance" requirement is a general statement of policy that explains how the EPA will exercise its discretionary duty of BMP approval in accordance with binding norms established in the CWA. While TMDLs themselves must undergo notice and comment rulemaking, EPA's policy of when to approve those TMDLs does not. The language of the guidance document does not itself create binding obligations, rather it reiterates legally binding norms included in the Clean Water Act statute. As the court in *Am. Farm Bureau* made clear, EPA requiring reasonable assurance, "is a practical measure that has a basis in Section 303(d) and 117(g)[of the CWA]."

Further, beyond what was cited by the courts in *Am. Farm Bureau*, there are other CWA sections that establish binding norms the "reasonable assurance" policy refers to. Under 33 U.S.C. § 1329, Congress promulgated rules for nonpoint source management programs. Part (d)(2) includes the procedure for disapproval of State management programs (which include BMPs):

> If, after notice and opportunity for public comment and consultation with appropriate Federal and State agencies and other interested persons, the Administrator determines that--

(A) the proposed management program or any portion thereof does not meet the requirements of subsection (b)(2) of this section or is not likely to satisfy, in whole or in part, the goals and requirements of this chapter;

(B) *adequate authority does not exist, or adequate resources are not available, to implement such program or portion*;

(C) the schedule for implementing such program or portion is not sufficiently expeditious; or

(D) *the practices and measures proposed in such program or portion are not adequate to reduce the level of pollution in navigable waters in the State resulting from nonpoint sources and to improve the quality of navigable waters in the State*;

the Administrator shall within 6 months of the receipt of the proposed program notify the State of any revisions or modifications necessary to obtain approval.

33 U.S.C. § 1329 (d)(2) (*emphasis added*)

Though the CWA generally leaves the direct regulation of nonpoint sources to the States, Congress entrusted EPA with the authority to approve of their management programs. Congress did not include circumstances where EPA should approve of a program, however, they did provide specific circumstances where they want EPA to *disapprove* of such plans. This further suggests the validity of the "reasonable assurance" requirement because, " [w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." (*See Raleigh & G.R. Co. v. Reid*, 80 U.S. 269, 270, 20 L. Ed. 570 (1871). All of the circumstances for disapproval (particularly (B) and (D), which are applicable to the case at bar) suggest that Congress did not want the EPA to approve of a state implementation plan unless there is "reasonable assurance that nonpoint source controls will be implemented and maintained."

3. The district court erred in upholding EPA's approval of BMP credits without providing reasonable assurance because a different policy interpretation fails to pass persuasiveness under *Skidmore*

When an agency creates a non-binding interpretation outside of adjudication or notice-and-comment rulemaking, like the "reasonable assurance" policy at question, such interpretation is given *Skidmore* deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (explaining that agency interpretations "contained in policy statements, agency manuals, and enforcement guidelines" created without notice-and-comment rulemaking or adjudication lack the force of law and receive Skidmore, not Chevron, deference). Under Skidmore, the level of deference due to an agency's "judgment in a particular case will depend upon [1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade, if lacking power to control." *Id.*; *see also Young v. United Parcel Serv., Inc*., 135 S. Ct. 1338, 1352 (2015).

The policy of requiring "reasonable assurance" for BMP approval passes all marks. The detailed explanations included in the guidance documents reflect the thoroughness of EPA's original consideration to require "reasonable assurance", satisfying the first prong. It satisfies the third prong of consistency because it is a longstanding policy, evidenced by the fact that it was in the TMDL guidance documents promulgated in 1991 and 1992 (current guidance) and multiple courts have acknowledged it as a valid part of the TMDL approval process over the years, as noted above. It further satisfies the second and fourth prong, because requiring "reasonable assurance" before approving a BMP credit is consistent with the terms of the CWA and necessary to uphold the wishes of Congress, who included specific circumstances where EPA should deny a TMDL management plan including lack of adequate authority or resources to implement a program or portion. 33 U.S.C. § 1329 (d)(2)(B).

Likewise, EPA changing its interpretation to not require "reasonable assurance" or a synonymous alternative, does not pass *Skidmore* deference because it is not consistent with the

longstanding policy, the agency has not given a reasonable explanation for their change in interpretation, and it disregards the specific circumstances under which Congress requested EPA deny a TMDL management plan.

EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious. There is a complete absence in the record of any indication that the State of New Union had any intention to require implementation of the BMPs contemplated by the CWIP. Indeed, New Union abandoned its efforts to develop its own watershed implementation plan, including BMPs, after faced with political opposition. And since the adoption of the TMDL, New Union has in fact taken no action to implement the BMPs contemplated by the CWIP. By not requiring "reasonable assurance", EPA failed to consider relevant factors that are statutorily required, including those in 33 U.S.C. § 1329 (d)(2)(B) and (D).

V. Conclusion

For the foregoing reasons, the Court should reverse the District Court's ruling on issue (2) and (4) and uphold their ruling on issue (3).