TEAM 52

C.A. Nos. 21-000123 and 21-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee

-and-

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant

On appeal from the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020

Brief of Appellant, ENVIRONMENTAL PROTECTION AGENCY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

In drafting the Clean Water Act ("CWA"), Congress took official note that the waters of the United States needed protection and rescue. Under that law, the Environmental Protection Agency ("EPA") and the states participate in a "cooperative federalism" framework working together to clean the Nation's waters. This case is about whether or not the EPA has the authority under the Act to overrule a state which is failing to protect and save its waters.

The waters of the United States are some of the country's most precious resources. In its mission to protect them, Congress has granted broad authority to the EPA under the Clean Water Act. One way that this authority is granted is by leaving ambiguity in the act itself that the EPA will then interpret to best achieve the goals of the act. In the present case, the EPA has interpreted a section of the act such that the agency can proscribe specific requirements for waste loads being emitted into the country's waterways. The EPA has been operating under this interpretation for over thirty five years in its mission to protect the United States waterways without congress directing them otherwise.

The State of New Union, having had their proposal that allowed waste to be continually added to the waterways rejected by the EPA, now proposes that this interpretation of the Clean Water Act is incorrect. In doing so, New Union seeks not only to overturn decades of administrative and legal precedent, they seek to forever alter the balance between state and federal power to protect this country's waterways.

If this interpretation is allowed to stand, the EPA's ability to further its mandate from congress to protect and rescue the Nation's waterways will be severely curtailed. As well, the Clean Water Act itself would lose much of its power to regulate the states. And in the end, Lake

Chesaplain and other waterways like it will continue to deteriorate beneath inefficient and unusable state implementation plans with no federal avenues available for remedy.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under Administrative Procedure Act § 702, 5 U.S.C. § 702, which governs the actions taken by the United States Environmental Protection Agency ("EPA"), and is thus a federal question. 5 U.S.C. § 702. The action taken by EPA to substitute its own Total Maximum Daily Load ("TMDL") is allegedly invalid under Clean Water Act § 303(d), 33 U.S.C. § 1313(d). Additionally, the actions taken by EPA are allegedly contrary to law, arbitrary and capricious, and unsupported by the record. 5 U.S.C. § 702. Venue is not an issue and is appropriate for the district court.

The district court issued its final order on September 1, 2021 and EPA timely filed its notice of appeal on November 22, 2021. Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over final decisions of the federal district courts. 28 U.S.C. § 1291 ("The courts of appeals . . . have jurisdiction of appeals from all decisions of the district courts of the United States.").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

II. Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load

allocations is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

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

IV. 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. Overview of Clean Water Act Water Quality Provisions

The declining water quality in Lake Chesaplain has led to a series of regulatory actions by both the State of New Union Department of Fisheries and Environmental Control and the United States EPA. These actions have been undertaken under the regulatory framework established by the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act ("the CWA"). The CWA established a comprehensive system of permitting and regulation for point source discharges of pollutants into the waters of the United States. Point sources are specifically defined by CWA § 502(14), 33 U.S.C. § 1362(14), but generally include pollution discharge pipes, and specifically include concentrated animal feeding operations ("CAFOs") that discharge to waters. Individual numerical permit limits for point sources are established for specific water pollutants based on technology-based standards set by EPA industry by industry, as well as based on standards designed to achieve desired levels of water

quality.

The CWA regulatory program is based on what is known as "cooperative federalism," *see New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), under which the federal EPA establishes national standards that states are expected to implement through their own regulatory programs. States are expected to administer both the permitting aspects of the CWA, *see* CWA § 402(b), 33 U.S.C. § 1342(b), and the water quality improvement aspects of the CWA, *see* CWA §§ 208 (planning process for nonpoint sources), 303 (state establishment of water quality standards), 33 U.S.C. §§ 1288, 1313. Failure of a state to undertake the permitting or certain aspects of the water quality program results in EPA administration of these programs.

It is the water quality-based regulation of water pollution that is the subject matter of these lawsuits. CWA § 303(a) directs each state to adopt water quality standards ("WQS") for waters within the state. 33 U.S.C. § 1313(a). Section 303(c) directs states to review, and as appropriate, revise these water quality standards no less frequently than once every three years. 33 U.S.C. § 1313(c). A WQS consists of the designated uses for each waterbody and the water quality criteria necessary to support the designated use. 33 U.S.C. § 1313(c)(2)(A). Water quality criteria may take the form of numerical limits on pollutant concentrations in the water body, or narrative standards for aesthetic qualities and non-specific pollutants such as toxicity. *See* 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b).

Once a state has established WQS for its water bodies, it must perform an assessment of the ability of each water body to meet these standards following full implementation of the technology-based point source controls established by the CWA. *See* CWA § 303(d), 33 U.S.C. § 1313(d) (cross referencing technology-based controls of CWA § 301(b)(1), 33 U.S.C. §

1311(b)(1)). As a practical matter, as the time for achievement of technology-based permit limits has long since passed, this section requires states to identify those water bodies that presently do not meet water quality standards. By regulation, EPA requires states to review and update their impaired waters list biennially. 40 C.F.R. § 130.7(d).

Once a water is listed as impaired, CWA § 303(d) directs the state to develop, and submit to EPA, a TMDL for the offending pollutants for that water body "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). By regulation (which New Union challenges in this action), EPA defines a TMDL as "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). In essence this regulation requires a state, as part of its TMDL submission, not only to establish the total maximum level of pollutant loading for a water body, but to allocate that level of loading among CWA permitted point sources in the watershed, taking into account the non-permitted nonpoint sources and natural background sources. A state must thus decide which dischargers will have to reduce their discharges beyond existing permit limits, and by how much. Alternatively, a state may take credit for nonpoint source pollution reductions: "If Best Management Practices ("BMPs") or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i).

EPA has authority to review and approve or reject each step of the water quality standards process, from the designation of uses to the establishment of water quality criteria to

the listing of impaired waters to the establishment of TMDLs for impaired waters. *See* 33 U.S.C. § 1313(c)(3), (d)(2). If the EPA Administrator disapproves of the proposed WQS, list of impaired waters, or TMDLs, then EPA is directed to establish its own WQS, list, or TMDLs. Id.

B. Lake Chesaplain Water Quality

Except as otherwise noted, the following facts are taken from the administrative record for the establishment of the Lake Chesaplain Phosphorus TMDL before EPA. Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located entirely within the State of New Union. Lake Chesaplain is bounded on the west side by the Chesaplain National Forest, which is used for timber production and harvesting as well as for recreational purposes such as hiking and fishing, and the twenty-mile-long shorefront of Chesaplain State Park, which has hiking trails, boat ramps, a public beach, and a campground. On the east side, Lake Chesaplain is bounded primarily by agricultural lands, with several lakefront vacation communities. The City of Chesaplain Mills is located at the north end of the lake, where the Union River flows into Lake Chesaplain. Lake Chesaplain's outlet is the Chesaplain River, which is a navigable-in-fact interstate body of water.

Prior to the turn of the twenty-first century, Lake Chesaplain enjoyed excellent water quality. Its clear waters attracted recreational boaters and fishers from the entire mid-north region of the country, as well as supporting the vacation communities on the east shore of the lake. However, starting in the 1990s, the Lake Chesaplain watershed experienced various economic development pressures. Over that decade, ten large-scale hog production facilities, also known as CAFOs, were developed in the Union River watershed, and a large-scale (greater than fifty million pounds per year) slaughterhouse was built in Chesaplain Mills to service the hog production facilities. At the same time, the recreational attractions of Lake Chesaplain led to a

boom in second home construction on and near the eastern lake shore. The slaughterhouse has a CWA National Pollutant Discharge Elimination System ("NPDES") permit issued by the State of New Union for a direct discharge into the Union River. Second home development on the Lake Chesaplain shoreline were largely serviced by septic systems that are not subject to CWA permits. In addition, Chesaplain Mills has a publicly owned sewage treatment plant ("STP") which discharges directly into Lake Chesaplain, as regulated by a CWA point source permit. The hog CAFOs are not subject to CWA permits, because although CAFOs are included in the definition of "point source" under the CWA, 33 U.S.C. § 1362(14), they are considered to be "non-discharging" CAFOs exempt from permitting requirements under the EPA regulatory definition of CAFOs. *See* 40 C.F.R. § 122.23. *See generally Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). The hog CAFOs are, however, regulated and subject to permits under a New Union statute providing for New Union Agricultural Commission review and approval of site specific nutrient management plans for the application of liquid manure wastes to fields.

Lake Chesaplain water quality visibly declined during the first decade of the twenty-first century. Mats of algae formed during the summer months, reducing the clarity of the water and promoting offensive odors. Fish productivity declined. The swimming beach at Chesaplain State Park became unsuitable for swimming, and property values for the vacation home communities declined. Tourism revenues from fishing and boating trips also declined.

C. Lake Chesaplain TMDL and Water Quality Standards Regulatory Actions

Pursuant to the New Union WQS, Lake Chesaplain is designated as Class AA, which is the classification reserved for the highest quality waters of the state. The designated uses include drinking water source, primary contact recreation (swimming), and fish propagation and

survival. In response to the decline in water quality, New Union created a Lake Chesaplain Study Commission in 2008 ("the Chesaplain Commission"). The Chesaplain Commission issued a report in August 2012 (the 2012 Chesaplain Report),[1] which included the following scientific conclusions. First, the Commission determined that Lake Chesaplain was suffering from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. Besides being aesthetically displeasing, this algae growth was also responsible for objectionable odors, decreased water clarity, and a decrease in dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. Summertime DO levels were found to be three milligrams per litre (mg/l), well below the five mg/l DO standard designated for class AA waters in the State of New Union. This excess algae growth, in turn, was caused by excessive amounts of the nutrient phosphorus in the water body. The commission determined that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l throughout the lake. Measured phosphorus levels in the lake varied from 0.020 to 0.034 mg/l, well above the desired level. In addition to the DO violations, the Chesaplain Commission also identified violations of the state's water quality standards for odor and water Clarity.

In the next triennial WQS review following the 2012 Chesaplain Report, conducted in 2014, the New Union Division of Fisheries and Environmental Control ("the DOFEC") adopted a water quality criteria for Class AA waters of 0.014 mg/l. As that standard was being violated along with the water quality criteria for DO, odors, and water clarity, DOFEC (as the designated New Union agency) included Lake Chesaplain on its impaired waters list also submitted to EPA in 2014.

DOFEC did not, however, submit a TMDL for Lake Chesaplain in its list of impaired waters. Despite this failure, EPA did not object to the § 303(d) submission. In 2015, plaintiff Chesaplain Lake Watch served a notice letter on both New Union and EPA, threatening to sue based on the failure of either agency to establish a TMDL for Lake Chesaplain. CLW agreed to refrain from suit as long as New Union conducted a TMDL rulemaking. DOFEC then commenced a state rulemaking proceeding to establish a TMDL. The Chesaplain Commission issued a supplemental report in July 2016, calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard, as well as identifying the existing sources of phosphorus inputs. The maximum loading was calculated at 120 metric tons (mt) annually. Existing loadings as of 2015 were calculated as totaling 180 mt, as follows:

Point Sources:

Chesaplain Mills STP 23.4

Chesaplain Slaughterhouse 38.5

Nonpoint Sources:

CAFO Manure Spreading 54.9

Other agricultural sources 19.3

Septic tank inputs 11.6

Natural sources: 32.3

Total 180 mt

The Chesaplain Supplemental Report specifically determined that the hog CAFOs contributed substantial phosphorus loadings to the Lake Chesaplain watershed, despite their status as “non discharging” CAFOs. A substantial portion of their manure spreading eventually

reached Lake Chesaplain through groundwater flows and surface runoff, despite compliance with state mandated nutrient management plans and the CWA exemption for agricultural stormwater runoff. *See* 33 U.S.C. § 1362(14). Likewise, a substantial amount of phosphorus reached Lake Chesaplain from private septic systems, even though these sources are exempt from CWA permitting as discharges to groundwater rather than surface water. *See* Septic Systems Overview, EPA, https://www.epa.gov/septic/septic-systems-overview (last visited Aug. 10, 2021). The Supplemental Report also noted that neither of the point sources in the Chesaplain Watershed had any permit limits for phosphorus, as no such limits are provided for in the relevant technology-based effluent limitations guidelines issued by EPA.

In October 2017, DOFEC publicly noticed a proposal to implement the TMDL through an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources. This reduction was proposed to be phased in over a period of five years—that is, a 7% reduction from the 180 mt baseline in the first year, a 14% reduction from the baseline in the second year, a 21% reduction from the baseline in the third year, a 28% reduction from the baseline in the fourth year, and a 35% reduction from the baseline by the fifth year. Point source reductions would be incorporated as permit limits, while the nonpoint source reductions were proposed to be achieved through a series of BMP programs designed to encourage the hog CAFOs and other agricultural sources. Proposed BMPs for agricultural sources included modified feeds for animal production facilities that would reduce phosphorus in manure, physical and chemical treatment of manure streams, and restrictions on manure spreading at times when the soil is frozen or saturated. Proposed BMPs for private septic systems consisted of increased septic tank inspection and pumping schedules.

Although the scientific conclusions of the Chesaplain Commission were not subject to

substantive challenge, DOFEC's proposal to require an equal 35% annual reduction among CAFO, other agricultural, residential septic system, and point source categories proved highly controversial. Residential lakefront homeowners objected to the expensive septic tank maintenance and pumping that would be required. The slaughterhouse and Chesaplain Mills objected to the expensive phosphorus treatment system that would be required to reduce discharges by 35%. Chesaplain Lake Watch objected to taking any credit for nonpoint source phosphorus reductions, arguing that the proposed BMPs for manure spreading, other agricultural practices, and septic tanks were insufficient to achieve a 35% reduction in nonpoint phosphorus inputs, and that New Union lacked the statutory authority to impose and enforce such BMPs against agricultural sources. Chesaplain Lake Watch demanded that the sixty-three mt annual reduction be achieved by requiring zero phosphorus discharges from the two identified point sources. In addition, Chesaplain Lake Watch argued that a 35% phased annual reduction was inconsistent with the CWA requirement for a TMDL, which, by statutory terms, should be a daily limit based on the scientific calculation without a phased implementation. The Hog CAFOs objected to the possible imposition of BMPs on their operations, and argued to DOFEC that EPA lacked the statutory authority to require implementation of loading limits against nonpoint Sources.

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 allocations or load allocations. Pursuant to CWA § 303(d)(2), EPA rejected the July 2018 TMDL, and, in May 2019, after notice and comment, adopted the original DOFEC TMDL proposal, consisting of a 35% reduction of annual phosphorus discharges by both point and nonpoint sources phased in over five years, to be implemented through permit controls on point sources and BMP

requirements for nonpoint sources. EPA called its combination of phased point source limits and BMP measures the "Chesaplain Watershed Implementation Plan" ("the CWIP"). The CWIP did not specify whether or how the proposed BMP measures would be enforced. EPA incorporated the entire record of scientific reports and public comments before the DOFEC into its own record. Although not part of the record before EPA, the following additional facts have been established by affidavits submitted by Chesaplain Lake Watch, and are not disputed by either New Union or EPA. The NPDES permit for the slaughterhouse expired in November 2018, and has not yet been reissued. The NPDES permit for the Chesaplain Mills sewage treatment plant likewise expired in February 2019. Both plants continue to operate under their expired permits as administratively extended based on their timely applications for permit renewal. *See* 40 C.F.R. § 122.6. As such, neither plant is currently subject to any limit on phosphorus discharges. DOFE has proposed to modify each permit to reflect the 35% annual phosphorus loading reduction phased in over five years after permit issuance, but both facilities have sought administrative hearings on this proposed requirement based on the cost of compliance. Since EPA's adoption of the Lake Chesaplain TMDL, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed. The state-issued nutrient management permits for the hog CAFOs have not been modified to incorporate any phosphorus reduction measures contemplated by the CWIP. Lake Chesaplain waters continue to violate water quality standards.

C. Proceedings Below

Plaintiff New Union filed action No. 66-CV-2020 on January 14, 2020. Plaintiff Chesaplain Lake Watch filed action No. 73-CV-2020 on February 15, 2020. Both actions are brought pursuant to the judicial review provisions of the Administrative Procedure Act, APA §

702, and the district court found jurisdiction pursuant to 28 U.S.C. § 1331. The district court granted unopposed motions to consolidate the two actions on March 22, 2020, and EPA lodged the administrative record with the Court on July 1, 2020.

Chesaplain Lake Watch submitted affidavits with its motion for summary judgment establishing that its membership includes individuals who reside near Lake Chesaplain and use Lake Chesaplain for recreational purposes including swimming, boating, and fishing. These affidavits further establish that these members' enjoyment of these activities has been diminished by the decline in Lake Chesaplain water quality. The district court was satisfied that Chesaplain Lake Watch met the requirements for standing under Article III of the Constitution, having established injury in fact, causation, and redressability. As well, the court was satisfied that the State of New Union has standing to challenge EPA's rejection of its Lake Chesaplain TMDL and substitution of EPA's own TMDL, finding that EPA's action will require implementation by New Union in the form of state-issued NPDES permits as well as affecting New Union's eligibility for federal water quality planning funds under CWA § 208, 33 U.S.C § 1288, as well as its eligibility to maintain its delegated NPDES permitting program. CWA § 303(e)(2), 33 U.S.C. § 1313(e)(2).

The court below first addressed the Ripeness of the issues for judicial review. It found that the issues before it were ripe for review because the TMDL in question contemplates specific NPDES permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay. As well, it found that the plaintiffs would be prejudiced if the validity of EPA's Lake Chesaplain TMDL is not subject to immediate judicial review.

Next, the district court addressed 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). The court ruled that the EPA's interpretation of the CWA was incorrect because the court believed the plain meaning of the statutory language did not permit this sort of interpretation. The court ruled that it was unambiguous, so the EPA's actions were impermissible under *Chevron* step one.

The district court then addressed 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 violates the CWA § 303(d) requirements for a valid TMDL. As before, the court ruled that the plain meaning of the statutory language was unambiguous, thus the EPA's interpretation was impermissible under *Chevron* step one.

Finally, the district court addressed 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. The court found that agency's actions were not arbitrary and capricious because the "reasonable assurance" standard has never been adopted by EPA through notice-and-comment rulemaking, and because the court found that the CWA § 303 TMDL program is a planning and information program, not an implementation program. This appeal followed.

SUMMARY OF ARGUMENT

The district court is incorrect in holding that the issues before it were ripe for review.

Delayed judicial review would not cause hardship to the plaintiffs. Chesaplain Lake Watch is in fact benefited from delayed judicial review, as Lake Chesaplain will continue to deteriorate as long as any sort of TMDL is prevented from being implemented. New Union faces

no hardship because there is no evidence that it will face issues with federal funding or its delegated NPDES permitting program if judicial review is delayed. The EPA faces no hardships from delayed judicial review because the TMDL is already developed, so the agency is not poised to spend more time, energy, and money in developing an implementation plan. As well, Judicial intervention would inappropriately interfere with further administrative action. The details of how the BMP measures will be enforced has yet to be determined, and judicial intervention may stymie these efforts. Finally, the courts would benefit from additional development of the facts. Whether or not the proposed BMP enforcement measures are capable of achieving the 35% reduction in nonpoint phosphorus inputs has yet to be seen. As well, the pending administrative actions regarding the point sources and their expired permits have yet to be resolved.

The district court incorrectly held that the EPA's interpretation of "total" in "total maximum daily load" is an impermissible interpretation of the CWA.

The EPA's interpretation of the phrase "total maximum daily load" to require allocation of all of the proposed individual reductions needed to meet that total is a permissible interpretation of 33 U.S.C. § 1313(d)(1)(C) due to ambiguity in the statute. Although the CWA commands the EPA to establish a total maximum daily load, nowhere in the statute does it proscribe how to do so. Other uses of "total" in the Clean Water Act support the interpretation that "total" means "the sum of the constituent parts of the load." Congress was ambiguous on the content of the words "total maximum daily load": they are not defined in the statute, and "total" is susceptible to multiple interpretations. The CWA is silent on how the EPA must set the loads, and the APA requires the EPA to provide information about how it arrived at its conclusion, which the agency has done in this case. This suggests that Congress wanted an expert to give

meaning to the words it chose, and...the EPA's interpretation falls within the gap created by Congress. In considering the steps that precede and culminate in drafting a TMDL, the Clean Water Act unambiguously requires the author to take into account nonpoint sources. Congressional silence on how to promulgate a TMDL and the congressional command that a TMDL be established only for waters that cannot be cleaned by point-source limitations alone combine to authorize the EPA to express load and waste load allocations.

The district court incorrectly granted summary judgment in favor of Chesaplain Lake Watch on its challenge to the EPA's TMDL.

Chesaplain Lake Watch had two grounds for challenging the EPA's TMDL - (1) the EPA's TMDL is expressed as an annual maximum load as opposed to a daily maximum load, and (2) the EPA's adopted TMDL was insufficient to assure achievement of water quality standards. Congress has not directly addressed what "daily" in "total maximum daily load" entails specifically. Nothing in the construction of the CWA or Congress's later actions regarding the Act suggest that implementation of a TMDL must exclude the potential for an annual or seasonal load. The court must consider whether the EPA's use of annual loads with regard to a TMDL is a permissible construction of the CWA. Because the CWA is a technical and scientific statute that requires a certain level of sophistication and because the EPA has been congressionally chosen to administer the Act, there is a high level of agency deference allocated to the EPA in interpretation. Here, the EPA considered the specific type of pollutant discharge along with the designated uses associated with the waterbody in arriving at the conclusion that a TMDL in the form of a total maximum *annual* load would be most appropriate. Additionally, there is nothing in the CWA that specifies a time period for a TMDL to achieve a certain level of water quality standard. There is no reference to a particular time frame, just that a TMDL must set maximum

loads at a level sufficient to achieve and continue meeting applicable water quality standards. Due to the lack of explicit statutory requirements and because the EPA is specifically charged with administration of the CWA, the court should defer to the EPA's interpretation.

The district court was correct in finding that the EPA's determination to permit credits for BMPs for nonpoint sources was not arbitrary and capricious nor an abuse of discretion. When a court reviews an agency's decision, the standard of review is whether the decision by the agency was arbitrary and capricious. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). A court is not to substitute its own judgement for that of the agency under review. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Because the agency's decision is reasonably discernible, EPA's decision was not arbitrary and capricious nor an abuse of discretion. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

EPA now hopes to affirm a federal agency's ability to act in a manner that is not arbitrary and capricious to fulfill its duties as described under the Clean Water Act in a scientifically adequate manner. Because there are no genuine issues of material fact in regards to the ripeness of this action, the TMDL created by EPA, nor the allocation of credits based on nonpoint source BMPs, EPA prays that this Court grant the motion for summary judgment in its favor.

STANDARD OF REVIEW

De Novo

In this case, the district court granted a motion for summary judgment in favor of New Union and against EPA in No. 66-CV-2020, holding that EPA's rejection of New Union's TMDL and adoption of EPA's TMDL and the CWIP is ripe for judicial review but that this decision by EPA is contrary to law and does not meet the requirements for a valid TMDL. The district court also granted a motion for summary judgment in favor of EPA in No. 73-CV-2020, holding that EPA's adoption of a credit for anticipated BMP pollution reductions was not arbitrary and capricious nor an abuse of discretion. The scope of review by this Court for a district court's granting of a motion for summary judgment is *de novo*. *See Pluet v. Frasier*, 355 F.3d 381 (5th Cir. 2004) (*citing Texas Med. Ass'n v. Aetna Life Ins.*, 80 F.3d 153, 153 (5th Cir. 1996)). Under a *de novo* standard of review, this Court owes no regard to the district court's conclusions. *See Salve Regina College v. Russell*, 499 U.S. 225, 237 (1991).

Standard for Summary Judgment

Under Federal Rule of Civil Procedure Rule 56, summary judgment is appropriate when "[t]he movant shows that there is no genuine dispute as to any material fact and . . . is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The materiality of a fact is identified by substantive law and only disputes of the facts that determine the outcome of the litigation will prevent summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When a motion for summary judgment is made, it is "'the burden of the moving party . . . to show . . . the absence of a genuine issue concerning any material fact.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) and reaffirming the burden as initially lying on the moving party). Any inferences that are drawn from the facts are "'viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co.*

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

ARGUMENT

1. **The EPA's determination to reject the New Union TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is not ripe for judicial review because there will be no hardships to the plaintiffs from delayed judicial review and because judicial intervention would inappropriately interfere with further administrative action.**

    a. *Legal Framework*

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993). Unripe claims are subject to dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000). In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). To address these issues in the context of a challenge to the lawfulness of administrative action, the Supreme Court has identified three factors to help guide the analysis: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Analyzing the issues at hand under this framework, the case is not ripe for judicial review.

    b. *Delayed review would not cause hardships to the plaintiffs.*

Beginning with Chesaplain Lake Watch, not only are the plaintiffs not harmed by delayed review, they are in fact benefitted. As it currently stands, Lake Champlain continues to violate water quality standards and there is nothing preventing it from doing so. The only current government action aimed at fixing the water quality issues of the state is the TMDL, the implementation of which is being halted by this judicial review. CLW's goal is to improve the water quality of the lake to the benefit of its members. By delaying judicial review, the water quality of the lake will continue to be poor and potentially degrade even further. Implementation of the final TMDL by the EPA would begin the process of reducing phosphorus discharges into the lake and improving water quality.

As for New Union, the State is not harmed by being required to implement NPDES permits without delay. While this may be an inconvenience or burden to the point sources currently operating under their expired NPDES permits, that hardship is not shared by the State. New Union could potentially face issues with federal funding and eligibility to maintain its delegated NPDES permitting program, however, nothing in the record indicates that this will come to pass under the EPA's TMDL plan.

Regarding hardship to the EPA, here, unlike in *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281., the TMDL implementation plan has already been developed. There would be no imposed "hardship on the EPA and the states not to hear this dispute now because they are poised to spend more time, energy, and money in developing an implementation plan." *Id*. at 293–294.

c. *Judicial intervention would inappropriately interfere with further administrative action.*

Implementation of the TMDL is to be done through an equal phased reduction over the period of five years, a 7% reduction in the first year, a 14% reduction in the second year, a 21% reduction in the third year, a 28% reduction in the fourth year, and a 35% reduction by the fifth year. How the TMDL is to be implemented has been decided. The details of how the BMP measures will be enforced has yet to be determined. "It is thus possible that the compliance dates or compliance points will be altered or abolished altogether." *City of Arcadia v. United States EPA*, 265 F. Supp. 2d 1142, 1158–59 (N.D. Cal. 2003) (holding that a similar TMDL plan was not ripe for judicial review). Judicial intervention at this point would interfere with the administrative action to develop and implement the BMP measures.

d. *The courts would benefit from further factual development.*

As described above, the details of BMP enforcement measures have yet to be determined. CLW argues that proposed BMP measures that may be implemented are insufficient to achieve 35% reduction in nonpoint phosphorus inputs. However, CLW has yet to provide any factual or scientific evidence to support these claims. As none of the proposed BMP measures have been authorized to be implemented, the factual record is unclear if there is any merit to these claims.

As well, the permits for both point sources have expired. Neither plant is currently subject to any limit on phosphorus discharge. DOFEC has proposed to modify each permit to reflect the 35% annual phosphorus loading reduction phased in over five years after permit issuance, but both facilities have sought administrative hearings on this proposed requirement based on the cost of compliance. The results of these administrative hearings are currently unknown.

For these reasons, the courts would benefit from further factual developments.

2. The EPA's determination to reject the New Union Chesaplain Watershed phosphorous TMDL on the grounds that the TMDL failed to include wasteload

allocations and load allocations was not contrary to law, and is a permissible interpretation of the term "total maximum daily load" in CWA §303(d).

a. *Legal Framework*

As the district court has stated, this issue is governed under the analysis explained by the Supreme Court in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). First, the court must inquire "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. In framing "the precise question at issue," we ask "whether the statute unambiguously forbids the Agency's interpretation." *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002); *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 294 (3d Cir. 2015). If the congressional intent is ambiguous, the court then proceeds to step two. There, the agency's interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. "Underlying Chevron's framework is the courts' understanding that Congress sometimes uses ambiguous language to delegate a scope of authority (or a gap to fill) to an administrative agency charged with administering the ambiguous statute." *Am. Farm Bureau Fed'n*, 792 F.3d at 294. "The [Supreme] Court over the last decade, beginning in *United States v. Mead Corp.*, [533 U.S. 218 (2001)], has explicitly re-grounded *Chevron* in congressional intent," specifically, "intent to delegate." Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 610 & n.7 (2014) (footnotes omitted); *Mead*, 533 U.S. at 226–27 ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). The Supreme Court reaffirmed

and made more explicit that Chevron deference recognizes Congress's intent to delegate gap-filling power to agencies. *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("Chevron . . . held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."); *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 Colum. L. Rev. 1143, 1145 (2012) ("'Chevron space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

Whether an interpretation falls within the scope of authority that Congress has delegated is for the courts to decide at *Chevron* Step One because "[t]he fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice." *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part); *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 314 (2014) ("Even under Chevron's deferential framework, agencies must operate within the bounds of reasonable interpretation." (internal quotation marks omitted)), *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.").

When an agency fills the gap left by ambiguous congressional intent, the courts then proceed to *Chevron* step two. There, the court does not ask whether it is the best possible interpretation of Congress's ambiguous language, instead, it extends considerable deference to

the agency and inquires only whether it made "a reasonable policy choice" in reaching its interpretation. *Brand X Internet Servs.*, 545 U.S. at 986.

b. *Chevron Step One*

The EPA's interpretation of the phrase "total maximum daily load" to require allocation of all of the proposed individual reductions needed to meet that total is a permissible interpretation of 33 U.S.C. § 1313(d)(1)(C) due to ambiguity in the statute.

i. Case Law on TMDLs

In response to challenges from both environmental and industry groups, courts have recognized the EPA's authority to fill the Clean Water Act's considerable gaps on how to promulgate a "total maximum daily load." *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 296 (3d. Cir. 2015); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002) ("[T]he EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of § 303(d)(1) waters and TMDLs."); *Muszynski*, 268 F.3d at 98–99 ("We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis. . . . Accordingly, we agree with [the] EPA that a 'total maximum daily load' may be expressed by another measure of mass per time."); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 245 (D.D.C. 2011) ("[T]he [Clean Water Act]'s references to water quality standards require only that a TMDL set load levels 'necessary to attain and maintain applicable water quality standards,' 33 U.S.C. § 1313(d)(1)(C), and do . . . not otherwise refer to any particular timeframe. . . . In light of the CWA's silence on whether applicable criteria must be achieved at all times or may be periodically violated, the Court looks to whether [the] EPA has reasonably resolved the issue.").

Outside of this, many circuit and district courts have defined TMDLs to accord with the EPA's regulations, "implying they did not present a problem". *Am. Farm Bureau Fed'n*, 792 F.3d at 295–96; *E.g.*, *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 n.8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Friends of the Earth*, 333 F.3d at 186 n.5; *Sierra Club*, 296 F.3d at 1025; *Hayes v. Whitman*, 264 F.3d 1017, 1021 n.2 (10th Cir. 2001); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995).

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. *Brand X*, 545 U.S. at 1002–03; *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("As it was in Chevron, the subject matter here is technical, complex, and dynamic. . . ."). There is no doubt that the Clean Water Act falls into this category of legislation. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985) ("[The Act] constituted a comprehensive legislative attempt to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality." (internal quotation marks and citation omitted)). Moreover, Congress's delegations to the EPA under the Clean Water Act are not limited to occasional ambiguous words. *Am. Farm Bureau Fed'n*, 792 F.3d at 297. 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).

ii. Statutory Text

While it is possible to interpret "total" in "total maximum daily load" to exclude specifications of proposed components of the total, as the district court has done, "other readings

are possible." *Am. Farm Bureau Fed'n*, 792 F.3d at 297. The district court's interpretation of "total maximum daily load" makes the word "total" redundant. "'Maximum daily load[s] . . . . established at a level necessary to implement the applicable water standard' would mean the same thing that…'total maximum daily load' means: a number set at a level needed to alleviate water pollution." *Id*. at 297. A more realistic interpretation of the word "total" is that it means "the sum of the constituent parts of the load." *Id*.

Other uses of "total" in the Clean Water Act support this interpretation. For instance, the agency must consider "the *total* cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors)." 33 U.S.C. § 1284(b)(1) (emphasis added). This indicates "that Congress does use the word to mean something more than a single number". *Am. Farm Bureau Fed'n*, 792 F.3d at 297. *See also* 33 U.S.C. § 1284(b)(4) (requiring "applicant to establish a procedure under which the residential user will be notified as to that portion of his *total* payment which will be *allocated* to the cost of the waste treatment services." (emphases added)).

Additionally, although Congress explicitly required the EPA to establish "total maximum daily loads," it nowhere prescribed how the EPA is to do so: "[Total maximum daily load] shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 USCS § 1313.

Congress was ambiguous on the content of the words "total maximum daily load": they are not defined in the statute, and "total" is susceptible to multiple interpretations. The CWA is silent on how the EPA must set the loads, and the APA requires the EPA to provide information

about how it arrived at its conclusion, which the agency has done in this case. “These factors suggest that Congress wanted an expert to give meaning to the words it chose, and...the EPA's interpretation falls within the gap created by Congress.” *Am. Farm Bureau Fed'n*, 792 F.3d at 298.

iii. Statutory Structure and Purpose of the CWA

The CWA assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states. The EPA sets limits on pollution that may come from point sources via a permitting process known as the National Pollutant Discharge Elimination System. 33 U.S.C. § 1342. Nonetheless, “in drafting a TMDL the Clean Water Act unambiguously requires the author to take into account nonpoint sources”. *Am. Farm Bureau Fed'n*, 792 F.3d at 299. This conclusion follows when considering the steps that precede and culminate in a TMDL.

1. Each state must designate a use for each body of water within its borders and set a target water quality based on that use. 33 U.S.C. § 1313 (c)(1), (2). The state must then enact "water quality standards" pursuant to state law. *Id*. at (a), (b).

2. In order to meet water quality standards, the EPA (or the states to which the EPA has delegated this responsibility) sets "effluent limitations," which are pollution limits on point sources. *Id*. *See also* 33 U.S.C. §§ 1311(b)(1)(A), 1362(11).

3. States must submit to the EPA a list of the waters within their boundaries for which effluent limitations (a.k.a. point-source pollution limits) are, by themselves, inadequate to attain the applicable water quality standard—i.e., those waters for which both point source and nonpoint source limitations will be necessary. 33 U.S.C. § 1313(d).

4. It is only for these waters, for which point source effluent limitations alone are insufficient, that a state must establish a TMDL.

5. TMDLs set the maximum amount of pollution a water body can absorb before violating applicable water quality standards. In the statutory context noted above, "it is impossible to meet those standards by point-source reductions alone. Therefore, the Clean Water Act requires the drafter of a TMDL to consider nonpoint-source pollution." *Am. Farm Bureau Fed'n*, 792 F.3d at 299.

"As should be apparent, TMDLs are central to the Clean Water Act's water-quality scheme because . . . they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water." *Meiburg*, 296 F.3d at 1025 (internal quotation marks omitted). "Specifically allocating the pollution load between point sources (primarily the EPA's responsibility) and nonpoint sources (the states' dominion) is a commonsense first step to achieve the target water quality". *Am. Farm Bureau Fed'n*, 792 F.3d at 299–300. *See* Michael M. Wenig, *How "Total," Are "Total Maximum Daily Loads"?* 12 TUL. ENVTL. L.J. 87, 150 (1998) ("Ideally, all ecosystem harms should be subject to numerical loading and allocation calculations to maximize TMDLs' value of providing the 'technical backbone' or 'blueprint' for a watershed approach.").

Because TMDLs only relate to bodies of water for which point source limitations are insufficient, they must take into account pollution from both point and nonpoint sources. "Congressional silence on how to promulgate a TMDL and the congressional command that a TMDL be established only for waters that cannot be cleaned by point-source limitations alone (necessarily implying that, whatever form the TMDL takes, it must incorporate nonpoint source limitations) combine to authorize the EPA to express load and waste load allocations." *Am. Farm Bureau Fed'n* 792 F.3d at 300.

c. *Chevron* Step Two

The EPA made "'a reasonable policy choice'" in its interpretation of the CWA. *Brand X Internet Servs.*, 545 U.S. at 997 (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984)). While the district court did not address if the EPA's decision to include WLAs and LAs in the TMDL was valid under *Chevron* step two, the EPA requests the Appellate Court to find that it is.

As the Supreme Court has admonished in the water-pollution context, "[w]e cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." *E.I. Du Pont De Nemours v. Train*, 430 U.S. 112, 132 (1977) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968)). Establishing a comprehensive TMDL—complete with allocations among different kinds of sources—is reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute. Therefore, the EPA asks the appellate court to find that its interpretation of the word "total" in "total daily load" is a reasonable policy choice under the CWA and the APA.

3. The EPA's construction of the phrase "total maximum daily load" to mean annual load and a phased approach is valid because the EPA has agency deference in ambiguous terms such as daily and because there is no time requirement for the achievement of water quality standards.

The EPA's TMDL is not contrary to the legal requirements of the CWA because a TMDL can be stated in terms of an annualized load. Additionally, there is nothing stated in the CWA that requires TMDLs ensure the achievement of water quality standards on the date of adoption.

The applicable analysis for a court tasked with reviewing an agency's construction of a statute the agency administers can be found in *Chevron*. In this case, the first question the court must answer is whether Congress has directly addressed the EPA's use of a time frame other

than daily in the implementation of TMDLs for the CWA. *Chevron, U.S.A., Inc.*, 467 U.S. at 842. If Congress has previously directly addressed the question at hand, there is no further analysis necessary. *Id*. at 843. If the court finds that Congress has not directly addressed whether the EPA's implementation of TMDLs should be in a daily time frame only, the question for the court becomes whether the EPA's answer in implementing the TMDLs in alternative time frames is "based on permissible construction" of the CWA. *Id*. In *Chevron*, it was expressed that considerable weight should go toward the agency in constructing the statute the agency was charged with administering. *Id*. at 844. In fact, the court found that an agency's statutory construction should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that congress would have sanctioned." *Id*. at 845.

The first question of *Chevron* has not been established in the present case. Congress has not directly addressed whether the EPA can implement a TMDL under the CWA with a time frame other than daily. The CWA does not define the "daily" in TMDL in Section 1313(d), which outlines the requirements for a TMDL. 33 U.S.C. §1313(d). Additionally, the CWA does not define "daily". 33 U.S.C. §1363. Congress has made no official comment to the CWA that directly addresses what it meant by its use of "total maximum daily load." Because Congress has not directly addressed the language in the statute, the analysis moves into step two of *Chevron*. The question becomes whether the EPA's annual TMDL is based on a permissible construction of the CWA. Several different appellate courts have previously analyzed such a question.

The D.C. Circuit Court of Appeals in *Friends of the Earth v. EPA* was deciding whether the word "daily" in the CWA's use of "total maximum daily load" could be stretched to include

a measure of time other than daily. *Friends of the Earth*, 446 F.3d at 142 (2006). The EPA approved two different TMDLs in response to pollutant discharge violations - one TMDL that limited the *annual* discharge of pollutants and a second TMDL that limited the *seasonal* discharge of pollutants. *Id*. The EPA argued that Congress left sufficient room in the statute to allow for "daily" to be translated as either seasonal or annual total maximum loads for suitable pollutants. *Id*. The court, however, believed the EPA's argument was lacking and brought up in the wrong forum. *Id*. The court suggested that, if the EPA's argument was solid enough to warrant any action, the EPA must either amend its own regulation or it must express its concern regarding the language of TMDLs to Congress. *Id*. While the lower court initially held there was no clear Congressional intent within the text of the CWA that would have required the EPA to calculate TMDLs based solely on the daily limit, the court of appeals disagreed. The court of appeals determined there was nothing in the CWA's language that insinuated the EPA could approve total maximum "annual" or "seasonal" loads. *Id*. The court noted the CWA specifically says "daily" and emphasized they saw nothing ambiguous about that command. *Id*. at 144. The court further opined that Congress left no gap for the EPA to fill because Congress specified "total maximum *daily* load." As such, the court made clear they could not have imagined a more obvious expression of intent by Congress with regard to total maximum daily loads. *Id*.

The EPA's decision to implement a TMDL based on a total maximum annual load for phosphorus is reasonable and reflects a legitimate policy choice. The question for the lower court was not whether the EPA's decision was the best possible decision. *Am. Farm Bureau Fed'n*, 792 F.3d at 295. Instead, the question is whether, with considerable deference extended to the EPA, the EPA made a "reasonable policy choice in reaching its interpretation." *Id*. The district court, therefore, erred in applying the *Chevron* deference.

Whether the EPA made a reasonable policy choice in reaching its interpretation of "daily" in "total maximum daily load" was more appropriately assessed by the Second Circuit Court of Appeals in *Natural Resource Defense Council v. Muszynski*. The court held that the CWA does not require TMDLs to be expressed strictly in terms of daily loads. *Muszynski*, 268 F.3d at 103. The case was remanded to the EPA for an explanation on why certain pollutant discharge TMDLs were warranted a time frame other than daily. *Id*. In the analysis, though, the court noted that the EPA's interpretation of the CWA cannot contradict the Act's plain language. *Id*. at 96. However, the court made it clear the EPA does have authority to "define a term in a way that is reasonable in light of the legislature's revealed design." *Id*. The court concluded that, with regard to specific combinations of some pollutants with some water bodies, the administrative record supported the EPA in expressing the TMDLs in terms of "mass per time." *Id*. The fact that the CWA states that each TMDL "shall be established at a level necessary to implement the applicable water quality standards" helped to emphasize this point to the court. 33 U.S.C. §1313(d)(1)(C). If the EPA found that the level necessary to implement the applicable water quality standards was an annual or seasonal load, the CWA warranted sufficient discretion to the EPA to do such.

The Second Circuit Court of Appeals' decision in *Natural Resource Defense Council* is clearly in contrast with the D.C. Circuit Court of Appeals' decision in *Friends of the Earth*. This court should not give the same weight to *Friends of the Earth* that the lower court did. Even after deciding *Friends of the Earth*, the District of D.C. has continued to allow the EPA to issue maximum annual or seasonal loads in addition to daily. *Am. Farm Bureau Fed'n*, 792 F.3d at 296. The district claims that, while it believes the statute was clear on the requirement for a maximum daily load, the statute was unclear on "whether another timeframe may be used when

that would be more appropriate for the particular pollutant at issue." *Id*. As such, the EPA's use of an annual TMDL should be considered appropriate under step two of the *Chevron* deference. The Supreme Court has found agency deference especially appropriate under *Chevron* when the agency is "charged with administering a complex statutory scheme requiring technical or scientific sophistication." *Id*. The CWA has been found to fit the parameters of technical or scientific sophistication. *Id*. In addition, Congress granted broad regulatory authority to the EPA. *Id*. at 297. The CWA specifically charges that "Except as otherwise expressly provided in this chapter, the administrator of the EPA shall administer this chapter." 33 U.S.C. §1251(d).

Similarly, the CWA does not require that a TMDL achieve a certain level of water quality standard on the date of adoption. TMDLs are meant to set levels necessary to achieve water quality standards, as instructed by the CWA. 33 U.S.C. §1313(d)(1)(C). This was expressly discussed in *Anacostia Riverkeeper, Inc. v. Jackson*, where the court concluded the CWA "does not specify a particular time period during which a TMDL must prevent violations of applicable water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp 2.d at 245 (D.D.C. 2011). The court found that the only requirement in the CWA with regard to water quality standards is that a TMDL set maximum loads at a level sufficient to achieve and continue meeting applicable water quality standards. *Id*. Otherwise, there is no reference to a particular time frame in the CWA. *Id*. Because there is no reference to a particular time frame, the EPA's use of a phased TMDL approach is something the court should defer to the EPA's interpretation of the CWA. The court, therefore, abused its discretion in granting summary judgment in favor of CLW on its challenge to the EPA's TMDL.

4. **The district court was correct in holding that the EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter for water quality standard compliance is not arbitrary and capricious nor an abuse of discretion.**

The arbitrary and capricious standard of review is highly deferential to the agency under review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). When reviewing an agency's decision, "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Even where the agency's reasoning may be "of less than ideal clarity," a court should uphold such a decision "if the agency's path may be reasonably discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). EPA's decision to adopt a previously rejected TMDL is not arbitrary and capricious as the adoption provides a reasonably discernable path.

Under its 1992 guidelines, EPA has relied upon a "reasonable assurances" standard when reviewing BMP implementations.[1] However, an agency is not bound to continue utilizing its previous policy or decisions but is allowed to change its policy as it deems necessary. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514 (2009) (holding that there is no heightened standard of review for a reversal of an agency's policy). While an agency's internal policies and guidelines are not normally subject to *Chevron* deference, *see Morton v. Ruiz*, 415 U.S. 199 (1974), these internal manuals may be afforded that deference even when the policy has not been through the notice-and-comment rulemaking process. *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) ("We have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."). Here, where the "reasonable assurances" standard was intended to be a guideline for reviewing TMDLs but was not a requirement, *Chevron* deference should be offered to EPA's decision to not require "reasonable assurances" for its determination regarding BMPs. *See also Am. Farm Bureau Fed'n*, 792 F.3d at

[1] ENVTL. PROT. AGENCY, GUIDELINES FOR REVIEWING TMDLS UNDER EXISTING REGULATIONS ISSUED IN 1992 (2002), https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf.

300 (finding that the EPA could exercise reasoned judgment in evaluating a state's proposed standards, even where that state had not submitted a "reasonable assurance").

Here, EPA followed a reasonably discernible path regarding its adoption of the Chesaplain Watershed Implementation Plan ("the CWIP"). EPA adopted the New Union record of scientific reports and the public comments before the New Union Department of Fisheries and Environmental Control ("the DOFEC") into its own record and created its own plan. *See* 33 U.S.C. § 1313(c)(3), (d)(2). However, nothing under the Clean Water Act ("the CWA") requires actual implementation of BMPs by nonpoint sources. *See, e.g.*, *Meiburg*, 296 F.3d at 1025. Rather, a state may take credit for these BMPs in order to reduce the stringency of the load allocations. 40 C.F.R. § 130.2(i).

Therefore, EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance is not arbitrary and capricious nor an abuse of discretion.

CONCLUSION

Upon the foregoing, Appellant EPA respectfully requests that this Court affirm the district court's grant of summary judgment for EPA, reverse the district court's grant of summary judgment against EPA, and remand for further proceedings consistent with this decision.