Team No. 53

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH
Plaintiff-Appellant-Cross Appellee

THE STATE OF NEW UNION
Plaintiff-Appellant-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

On Appeal from the United States District Court for the District of New Union

Brief of Defendant - Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

The purpose of the United States Environmental Protection Agency is to protect human health and the environment. One of the pillars upon which the Environmental Protection Agency ("EPA") stands, is to ensure that the citizens of the United States have clean air and water. EPA is a regulatory agency Congress authorized to write regulations explaining environmental laws. The Clean Water Act relies on EPA for its administration. The case at hand lingers upon the deference allotted and authority given to EPA in their application and interpretation of The Clean Water Act.

JURISDICTIONAL STATEMENT

EPA appeals from the order directing it to approve New Union's Lake Chesaplain TMDL entered on August 15, 2021, by the Honorable Judge Remus in the United States District Court for the District of New Union.

Plaintiffs brought both consolidated actions Nos. 66-CV-2020 and 73-CV-2020 pursuant to the judicial review provisions of the Administrative Procedure Act. 5 U.S.C. § 702. The district court therefore had subject matter jurisdiction in addressing a federal question. 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal because it comes from a final judgment of a district court of the United States. 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Whether EPA's determination to reject New Union's 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's 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. THE CLEAN WATER ACT

In 1972, Congress passed the Clean Water Act ("CWA") to promote the "restoration and maintenance of chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA is a regulatory scheme under the doctrine of cooperative federalism by which the federal government, through the EPA, establishes national standards that it expects the states to implement through their own programs. *See New York v. United States*, 505 U.S. 144, 167 (1992) (noting that cooperative federalism has been replicated in the CWA). This regulatory scheme accounts for what the CWA defines as point sources of pollution, discernible conveyances into the country's waters, and nonpoint sources. 33 U.S.C. § 1362(14). The CWA uses a permit system to regulate point sources which does not apply to nonpoint sources. Instead of a permit system, each state's water quality standards ("WQS") consider nonpoint source pollution.

Through cooperative federalism, it is the state's responsibility to issue permits and set WQS based on federal regulations for every waterbody in that state. 33 U.S.C. § 1313. Should a state fail to do so, the Environmental Protection Agency ("EPA") will administer the programs. 33 U.S.C. § 1313(c)(3), (d)(2). WQS address the designated uses of each body of water and how to support that use. 33 U.S.C. § 1313(c)(2)(A). States need to review their WQS at least once every three years. 33 U.S.C. § 1313(c). For severely polluted waters, the states must identify when the WQS will not be sufficient for that waterbody's designated use and then create a priority ranking for these impaired waters. 33 U.S.C. § 1313(d)(1)(A). When a body of water joins that list, the CWA requires the state to create and send to the EPA a total maximum daily load ("TMDL") for the pollutants causing the water quality problems in that body. 33 U.S.C. § 1313(d)(1)(C). The EPA has defined a TMDL in its regulations 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). Essentially, this provision requires states to contemplate the permitted point sources, nonpoint sources without permits, and natural background sources. One of the EPA's regulations allows for states to take credit for reductions in nonpoint source pollution through Best Management Practices ("BMPs") or other controls. 40 C.F.R. § 130.2(i). Beginning in 1992, states have had to biennially update their list of impaired waters. 40 C.F.R. § 130.7(d).

B. LAKE CHESAPLAIN

In the early twenty-first century, Lake Chesaplain appeared like it would soon join the list of impaired waters. Lake Chesaplain is a natural lake fifty-five miles in length and five miles in width located entirely in the state of New Union. Record at *[7]. On its western bank is the Chesaplain National Forest, used in the timber industry and for recreational purposes, and Chesaplain State Park, home to trails, boat launches, a public beach, and a campground. Record at *[7]. On the east side of the lake is mostly agricultural lands and vacation communities. Record at *[7]. Union River flows into the lake from the north, where the city of Chesaplain Mills lies. Record at *[7]. The lake's outlet is the Chesaplain River, a navigable-in-fact

waterbody. Record at *[7]. Before the year 2000, Lake Chesaplain experienced excellent water quality that attracted a large number of tourists. Record at *[7]. However, the nineties saw several developments around Lake Chesaplain. Record at *[7]. A hog slaughterhouse was built in Chesaplain Mills to process more than fifty million pounds of meat per year, and at the same time vacationers began construction projects building second homes along the eastern banks of the lake. Record at *[7]. Moreover, Chesaplain Mills has a sewage treatment plant ("STP") that conveys directly into the lake and is subject to a CWA permit. Record at *[7]. The hog production facilities, or concentrated animal feeding operations ("CAFOs") are typically point sources and thus require a permit to discharge. 33 U.S.C. § 1362(14). However, the EPA considers these CAFOs to be non-discharging point sources and are therefore exempt from CWA permits. 40 C.F.R. § 122.23; *see Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) (holding that the EPA cannot require a permit until there is an actual discharge). The water quality in the lake declined such that algae formed in the summer months, fish productivity waned, and the public beach became unsuitable for swimmers. Record at *[7].

New Union's WQS classifies Lake Chesaplain as the highest quality waters in the state. Record at *[8]. In 2008, in response to the decline in water quality, the state established a Lake Chesaplain Study Commission that produced a report examining the water quality problems in the lake. Record at *[8]. The report explained that increased algae caused less biological production, offensive odors, decreased water clarity, and lower levels of dissolved oxygen. Record at *[8]. The report opined that the algae were caused by excessive phosphorous in the lake. Record at *[8]. The ideal level of phosphorous in a healthy Lake Chesaplain would be 0.014 mg/l (milligrams per liter). Record at *[8]. The actual levels varied from 0.020 mg/l to 0.034 mg/l. Record at *[8]. In 2014, New Union added Lake Chesaplain to the impaired waters list. Record at *[8]. However, at that time the state never issued a TMDL for the lake, and the EPA did not impose its own. Record at *[8].

In 2015, that lack of a TMDL caused the Chesaplain Lake Watch ("CLW") to threaten to sue both New Union and the EPA unless New Union were to establish a TMDL. Record at *[8].

The Lake Chesaplain Study Commission found that, in order to achieve the ideal 0.014 mg/l, the maximum phosphorous loadings for the lake were 120 mt (metric tons). Record at *[8]. In 2015, the existing loadings totaled 180 mt, with the STP contributing 23.4 mt and the slaughterhouse adding 38.5 mt to the lake as the point sources; the CAFOs 54.9 mt, septic tanks 11.6 mt, and other agricultural sources 19.3 as the nonpoint sources; and 32.3 mt from natural sources. Record at *[8-9]. At that time, the two point sources had no permit limits for phosphorous. Record at *[9].

New Union decided to reduce the phosphorous to the TMDL over a five-year phased reduction plan. Record at *[9]. The state planned to reduce the point source polluters by issuing permits that limit the amounts of phosphorous they were allowed to discharge. Record at *[9]. Additionally, New Union proposed several BMPs for the nonpoint sources, such as modified feeds for animal production facilities, treatment of manure streams as well as restrictions on manure spreading, and increased septic tank inspections and pumping. Record at *[9]. The phased plan would require each of the individual pollution sources to reduce their phosphorous discharges by thirty-five percent by the fifth year. Record at *[9].

C. PROCEDURAL HISTORY

This plan was unfavorable to not only the polluters in the report, but also the CLW. Record at *[9]. New Union reevaluated its implementation plan for the phosphorous TMDL, but the EPA ultimately accepted the plan that proposed the five-year phased reductions. Record at *[10]. The EPA named the combination of phased point source limits and nonpoint source BMPs the “Chesaplain Watershed Implementation Plan” (“CWIP”). Record at *[10]. The CWIP did not specify how New Union would enforce proposed BMPs. Record at *[10].

The CWA permit for the slaughterhouse expired in 2018, and STP’s permit expired in 2019. Record at *[10]. New Union has reissued neither permit. Record at *[10]. At the time of this suit both of those point sources had not been subject to the permit limits. Record at *[10]. Additionally, New Union has taken no steps to implement BMPs for nonpoint sources. Record at *[10]. Lake Chesaplain continues to violate WQS. Record at *[10].

New Union filed action No. 66-CV-2020 in January of 2020, and CLW filed action No. 73-CV-2020 in February of 2020. Record at *[10]. The district court granted motions to consolidate in March of 2020. Record at *[10]. It then granted summary judgment in favor of New Union in action No. 66-CV-2020 and granted summary judgment in favor of the EPA on complaint No. 73-CV-2020. Record at *[16]. This timely appeal follows.

SUMMARY OF THE ARGUMENT

The issue presented before the court in this matter is not ripe for judicial review. Courts cannot review an agency action that is not final in order to avoid interference with executive administrative action. In this case there is no final agency action because a TMDL is a plan, which is an ongoing process. As such, there is no final action from which concrete legal consequences flow.

The EPA did not abuse its discretion in rejecting New Union's revised TMDL. In refusing to accept New Union's TMDL, the EPA acted within its authority in determining the meaning of TMDL. Additionally, it was reasonable for the EPA to approve a phased implementation of the New Union TMDL because the CWA articulates no timeline or specification for such implementation. In accepting New Union's credit toward the TMDL for BMPs, the EPA did not abuse its discretion because states have the ultimate say in how to achieve their TMDL goal.

STANDARD OF REVIEW

A. Summary Judgement

The court of appeals reviews the grant of a motion for summary judgment de novo and applies the same standard as the district court. *See T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cty., Kansas City, Kan.*, 546 F.3d 1299, 1306 (10th Cir. 2008). In doing so, the court asks if the moving party has established that it is entitled to a verdict in its favor by a

preponderance of the evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Issues of ripeness before an appellate court are reviewed de novo. *See Lopez v. City of Houston*, 617 F.3d 336, 339 (5th Cir. 2010).

B. Statutory Construction

"Statutory analysis begins with the plain meaning of a statute." Nat. Resources Def. Council, Inc. v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001) (citing *United States v. Dauray,* 215 F. 3d 257, 260 (2d Cir.2000)). "The plain meaning can be extrapolated by giving words their ordinary sense." *Id.* "If the plain meaning of a statute is susceptible to two or more reasonable meanings, i.e., if it is ambiguous, then a court may resort to the canons of statutory construction." *Id.* "[W]hen determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure." *Id.* "[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Id.* (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)). "[I]f the canons of statutory interpretation and resort to other interpretive aids (like legislative history) do not resolve the issue, we will give deference to the view of the agency tasked with administering the statute, particularly insofar as those views are expressed in rules and regulations that implement the statute." *Id.* When there is statutory ambiguity the courts should conduct a *Chevron* analysis to decide whether an agency's interpretation of statute and action is permissible. When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). If the agency's interpretation of an ambiguous statute is reasonable then the court must accept it. *Natl. Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002). A reasonable

interpretation must include specific context in which the language is used and broad context within the statute as a whole. *Util. Air Reg. Group v. E.P.A.*, 573 U.S. 302, 321 (2014). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984). "It is by now a commonplace that when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980) (internal quotations omitted). "It is a fundamental tenet of statutory interpretation that the intent of the legislature, as evidenced by the language of the statute, controls." *Green v. Sunday River Skiway Corp.*, 81 F. Supp.2d 122, 126 (D. Me. 1999) (citing *Central Maine Medical Center v. Maine Health Care Finance Comm'n,* 644 A.2d 1383, 1386 (Me.1994)). "The language of the statute must be construed 'to avoid contradictory or illogical results.'" *Green v. Sunday River Skiway Corp.*, 81 F. Supp.2d 122, 126 (D. Me. 1999) (citing *Rubin v. Board of Envtl. Protection,* 577 A.2d 1189, 1191–92 (Me.1990)). "Thus we consider the whole statutory

scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Green v. Sunday River Skiway Corp.*, 81 F. Supp. 2d 122, 126 (D. Me. 1999) (quoting *Melanson v. Belyea,* 1997 Me 150, ¶ 4, 698 A.2d 492, 493 (1997)). As a government agency, the EPA's actions are entitled to a specific scope of review. 5 U.S.C. § 706. In reviewing an agency's decision, courts must only look to the agency's reasoning and review if it was arbitrary and capricious, not replace its own judgment for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). The arbitrary and capricious standard requires that a court need only look at whether the agency has examined the relevant data and articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962). The court must allot agency deference for statutory interpretation for an act which the agency is charged with administering. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

ARGUMENT

I. EPA's determination to reject New Union's phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is not ripe for judicial review

because it is an intermediate agency action that does not decide the rights or obligations of any party.

Final agency action for which there is no other adequate remedy is subject to judicial review. 5 U.S.C.A. § 704. EPA's decision to reject New Union's TMDL and adopt its own TMDL and implementation plan ("CWIP") is not ripe for judicial review because it is not a final agency action. EPA's adoption is an intermediate agency decision that does not create legal consequences for CLW or New Union and therefore is not ripe for judicial review.

An agency action is final if: (1) the action is not intermediate or interlocutory, and (2) the action decides the rights and obligations of a party, or "legal consequences flow" from the decision. *Bravos v. Green,* 306 F. Supp.2d 48, 55 (D.D.C. 2004). An action which serves as a tentative recommendation rather than a final binding decision will not be considered final agency action. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Courts must avoid judicial interference with agency decisions until the decisions involve "effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (citing *Natl. Automatic Laundry and Cleaning Council v. Shultz*, 443 F. 2d 689, 696 (D.C. Cir. 1971)). A court may consider hardships like the "creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being force[d] ... to modify [one's] behavior in order to avoid future adverse consequences." *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012). However, hardship considerations "will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions" of agencies. *Transport Robert (1973) LTEE v. U.S. I.N.S.*, 940 F.Supp. 338, 340 (D.D.C. 1996).

A court may not review an executive action of an agency which is not final to avoid interference with the executive function of administrative agencies, such as EPA, by entertaining a lawsuit that challenges an action that is not final. *Natl. Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971).

An agency plan is not a final agency action. Lujan v. Natl. Wildlife Fedn., 497 U.S. 871, 890 (1990). Specifically, establishing a TMDL is not a final agency action. *City of Arcadia v. U.S. EPA*, 265 F.Supp.2d 1142 (N.D. Cal. 2003); *see Bravos*, 306 F.Supp.2d at 55. Although the EPA must consider the TMDL when issuing NPDES permits for point source discharges, the implementation of best management practices and changes in load allocations from natural sources will change the amount of point source pollution the EPA may approve. Unlike NPDES permits, TMDLs are not federally enforceable. *Bravos*, 306 F.Supp.2d at 52.

Neither New Union or CLW have identified concrete legal consequences flowing from EPA's TMDL. The TMDL is a document designed to guide New Union and EPA. Until EPA issues or denies permits on the basis of the TMDL, EPA has not performed a final agency action. The decision of the District Court Judge should be overturned. New Union and CLW's complaints against EPA are not ripe and should be dismissed.

II. EPA's determination to reject the New Union's phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is within EPA's discretion because the term "total maximum daily load" in CWA § 303(d) plainly implies adding at least two values, or, alternatively, "total maximum daily load" is ambiguous, and EPA's definition is not arbitrary and capricious.

"Total," in "total maximum daily load," either has a plain meaning, or it does not. If total has a plain meaning, total means to add together values, and total maximum daily load means both the waste load and the load allocations must be listed. If total is ambiguous, then EPA has

discretion to interpret it, and EPA did not abuse its discretion by interpreting total to mean the sum of load and waste load allocations.

A. The plain meaning of "total" calls for the TMDL to list both load and waste load allocations because "total" means adding values together.

The inclusion of the components required to achieve a total is within the plain meaning of the word "total." Babcock. *Webster's Third New International Dictionary* (1961). "Total" is "a result of addition: aggregate, sum (cumulative~)." Babcock. *Webster's Third New International Dictionary* (1961). Total is "a number or quantity obtained as a result of addition" and includes synonyms for the word total as "sum" and "aggregate." Houghton Mifflin. *Roget's II The New Thesaurus* (1980). To reach a total requires the summation of different factors of an equation, and a sum cannot be reached without the addition of addends. Total is "the amount obtained by addition" and the conjugation being to "determine the total of, add up" Houghton Mifflin. *American Heritage College Dictionary* (4th ed. 2002). The total, or sum can only be achieved through the process of adding up more than one component of the total. The inclusion of load and wasteload allocations in a TMDL, as two values that could be added, falls within the plain meaning of the word "total."

B. Even if "total" is ambiguous, EPA has the authority to require a TMDL to list both load and waste load allocations because EPA did not abuse its discretion by defining total as the sum of two values.

"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." Record at *[6] (citing 33 U.S.C. § 1313(c)(3), (d)(2)). "If the Administrator disapproves such identification

and load, he shall . . . establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section." 33 U.S.C.A. § 1313 (d)(2).

The term "Total Maximum Daily Load" is defined by EPA in the Federal Code of Regulations and includes wasteload and load allocation. 40 C.F.R.§130.7(a). In *Udall v. Tallman*, the court found that statutory interpretation by an agency such as EPA should be given deference, but an even higher amount of deference should be given when an agency is interpreting a regulatory term. 380 U.S. 1, 16 (1965).

"[A]lthough Congress explicitly required the EPA to establish 'total maximum daily loads,' it nowhere prescribed *how* the EPA is to do so…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." *Am. Farm Bureau Fedn. v. U.S. E.P.A.*, 792 F. 3d 281, 298 (3d Cir. 2015). "EPA's construction of the TMDL requirement comports well with the Clean Water Act's structure and purpose. 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." *Id.* at 299. The claim that Congress's intent for the CWA contradicts a discernment between the load allocations for nonpoint sources and wasteload allocations for point sources is inaccurate because it leaps over the reasonable statutory interpretation of the agency (EPA) who is charged with its administration, and it ignores the distinction between these two types of pollution sources that Congress identified.

This court should reverse and remand the district courts order vacating EPA's TMDL because EPA either followed the plain meaning of the statute, or the statute is ambiguous and EPA's interpretation is reasonable.

III. EPA's adoption of a TMDL for Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years is valid under the CWA § 303(d) requirement for a valid TMLD because the TMDL expresses loading reductions as a function of time and EPA should have the discretion to create achievable goals in TMDLs.

The TMDL in the instant case should be upheld because: (1) An annual pollution loading reduction upholds the plain meaning of CWA § 303(d) as a valid expression of pollution over time, and alternatively, Congress's use of the term "daily" is ambiguous, so 40 C.F.R. § 130.2, the EPA's regulation interpreting "TMDL," controls; and (2) phasing in the TMDL goals over five years represents a valid interpretation of CWA § 303(d)(1)(C)'s ambiguous requirement that the "load shall be established at a level necessary to implement the applicable water quality standards" because the five year phased TMDL will reach applicable water standards in about five years, a reasonable timeline for TMDL's to take effect.

A. A TMDL may list a total maximum annual load instead of a total daily maximum load because an annual load provides the same essential information.

"[T]he term "total maximum daily load" is susceptible to a broad[] range of meanings." *Nat. Resources Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Because the meaning of total maximum daily load is ambiguous, the C*hevron* deference gives the EPA the authority to give reasonable meaning to the term. In *Muszynski*, the court upheld EPA's interpretation of total maximal annual load, explaining that the court was "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." *Id*. The court held that a reading of total

maximal daily load that strictly limited the EPA would be "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id*. "EPA's implementing regulations note that TMDLs 'can be expressed in terms of either mass per time, toxicity, or other appropriate measure.'" *Id.* at 97 (quoting 40 C.F.R. § 130.2(i)). "In the case of each pollutant, effective regulation requires agencies to determine how the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody." *Id.* at 98. "In the case of … pollutants[] like phosphorus, the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately." *Id.* The court agreed "with EPA that a 'total maximum daily load' may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Id*. at 98-99. EPA still must provide a basis for their decision to measure annually. *Id*. at 99. *But see Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 144 (D.C. Cir. 2006) ("[n]othing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command"); *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 171 (D.D.C. 2019).

B. A TMDL may implement a phased reduction plan under the CWA § 303(d) requirement for a valid TMLD.

> 33 U.S.C.A. § 1313(d)(2) states in part:
>
> If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such

identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

The statute does not provide a timeline for when the water quality standards must bring the pollutant levels below problematic levels. *See* 33 U.S.C.A. § 1313(d)(2). Under *Chevron*, EPA is entitled to the court's deference for EPA's interpretation of the ambiguous language. The statute requires the EPA to make a determination as to when a body of water should be clean, a numerical determination. "[W]here a complex administrative statute, like those the EPA is charged with administering, requires an agency to set a numerical standard, courts will not overturn the agency's choice of a precise figure where it falls within a 'zone of reasonableness.'" *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9, 28 (1st Cir. 2012). See *Hercules, Inc. v. Envtl. Protec. Agency*, 598 F.2d 91, 106–07 (D.C. Cir. 1978) ("[i]n reviewing a numerical standard, we must ask whether the agency's numbers are within a 'zone of reasonableness,' not whether its numbers are precisely right."); *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 525 (D.C. Cir. 1983) ("[t]here may be no strong reason for choosing 1.10 gplg rather than a somewhat higher or lower number. If so, we will uphold the agency's choice of a numerical standard if it is within a 'zone of reasonableness'"); *Kennecott v. U.S.E.P.A.*, 780 F.2d 445, 450 (4th Cir. 1985) ("[t]he question is thus whether EPA acted reasonably in basing effluent limitations for the primary base metals industry on the CMDB").

EPA's five year plan falls within a zone of reasonableness. TMDLs are initially created in order of severity of their pollution and their beneficial uses. *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F. Supp. 2d 1184, 1188 (D. Mont. 1999). Once a state begins developing a TMDL, the TMDL may take more than fifteen years to finalize. *See Am. Farm Bureau Fedn. v.*

U.S. E.P.A., 984 F. Supp. 2d 289, 300 (M.D. Pa. 2013), aff'd, 792 F.3d 281 (3d Cir. 2015) (states planned to complete TMDL in eighteen years). Courts have refused to enforce strict deadlines for TMDL development. *See Nat. Resources Def. Council, Inc. v. Envtl. Protec. Agency*, 490 F.Supp. 3d 190, 191–92 (D.D.C. 2020) (court refused to require EPA to submit TMDL within one year even though TMDL had already seen at least eight years of development).

If this court decides to that EPA's TMDL does not uphold the CWA, the court must decide whether the TMDL should stay in effect: "The decision whether to vacate depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Nat. Resources Def. Council, Inc. v. Envtl. Protec. Agency*, 301 F. Supp. 3d 133, 145 (D.D.C. 2018) (quoting *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 52 (D.D.C. 2010)). EPA's plan commands greater deference because the plan will likely reach its final phase before a new TMDL would be implemented in its place. *See Envtl. Law & Policy Ctr. v. EPA*, 415 F. Supp. 3d 775, 778–79 (N.D. Ohio 2019) ("EPA guidance documents suggest that states should establish TMDLs within 8 to 13 years from the date of the original listing of a particular waterbody as impaired"). Because the supposed deficiencies are temporary (five-year phased plan) and inconsequential (annual rather than daily maximum load, which may be divided by three-hundred sixty-five and one quarter to reach a daily maximal load), EPA's TMDL should be upheld even if the deficiencies would otherwise invalidate the TMDL.

IV. 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 complies with the CWA because there is no requirement that there be reasonable assurances that reductions will be achieved.

The District Court correctly determined that the EPA's review of New Union's TMDL was not arbitrary and capricious. There was no clear error of judgment when the EPA allowed New Union to take credit for nonpoint source pollution reductions. *See Center For Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007). EPA rejected New Union's 2018 TMDL in May 2019 and replaced it with the TMDL that New Union had proposed originally. The CWA only requires the EPA to approve an implementation plan, and reasonable assurances, as the CLW may argue, are not necessary. Because the nature of the implementation plan involves making predictions, this court should treat the EPA's determination with the most deference. *See Upper Blackstone Water Pollution Abatement Dist. v. U.S. Env't Prot. Agency*, 690 F.3d 9, 20-21 (1st Cir. 2012) (holding that courts should be most deferential when reviewing predictions made within an agency's scientific expertise). Here, the EPA has correctly approved New Union's original TMDL.

A. The CWA does not require EPA to oversee the implementation of BMPs once it approves New Union's plan to do so.

The CWA does not mandate the EPA to control nonpoint source pollution in individual states. The plain language of the statute says that states produce plans that identify BMPs, which pertain to nonpoint source pollution, subject to the approval of the EPA. 33 U.S.C. § 1329(b). Once the EPA has approved a state's TMDL, it is up to the state to implement the control of nonpoint source pollution. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1034 (11th Cir. 2002). In *Meiburg*, the plaintiff environmental group challenged the EPA's approval of the state of Georgia's implementation of its TMDL. *Id.* at 1026. Repeatedly, Georgia had failed to implement according to the TMDL's schedule. *Id.* at 1033. In dismissing the action, the Eleventh Circuit held that the CWA does not require the EPA to oversee the state's implementation of a plan for point source permits and nonpoint source BMPs. *Id.* at 1034.

In this case, the EPA has correctly allowed New Union to credit nonpoint source BMPs. *See id.* The EPA followed protocol when it rejected New Union's Lake Chesaplain TMDL and replaced it with an earlier proposal for a TMDL. *Id*; 33 U.S.C. § 1313 (c)(3), (d)(2). Once the

implementation occurs, it is the state's obligation to oversee the adherence to the TMDL. *See id.* at 1026; *City of Arcadia v. U.S. Env't Prot. Agency*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003) (holding that TMDLs are not self-executing by nature and require the state's implementation). Moreover, existing regulations allow the state deference to take credit for nonpoint source reductions. *See* 40 C.F.R. § 130.2(i). Therefore, nothing was improper about the EPA adopting for New Union the state's DOFEC original TMDL that took credit for reductions in nonpoint source pollution. *See* 40 C.F.R. § 130.2(i). As the court in *Meiburg* suggests, even if the EPA proposes an implementation plan, it is solely for the state to implement. 296 F.3d at 1034; 33 U.S.C. § 1329. Even though New Union has taken no action to implement the contemplated BMPs, just as Georgia had failed to do in *Meiburg*, the EPA may still correctly rely on that implementation plan, because the EPA has no implementation authority. *See id*; *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008) (holding that the most regulatory action the EPA may take when faced with lack of implementation is to withhold funding). Therefore, no requirement exists for the EPA to implement a proposed TMDL.

B. The EPA's approval of New Union's TMDL is not an abuse of discretion because there is no requirement that the state provide reasonable assurances that reductions will be achieved.

The CWA does not require that the EPA approve a state's plan only if the state can provide reasonable assurances that it will implement the BMPs. *Bravos v. Green*, 306 F. Supp. 2d 48, 57 (D.D.C. 2004). *Bravos* was a dispute over the EPA's approval of an implementation plan that failed to consider reasonable assurances. *Id.* at 50. The court, in granting summary judgment to the EPA, held that there was no statutory basis for the EPA to require states to include reasonable assurances about the implementation of a TMDL plan. *Id.* at 50.

Although New Union has not provided the EPA with reasonable assurances, no statute exists that calls for such measures. Much the like case before the district court in *Bravos*, this case involves regulation of WQS. *Id.* at 57. While CLW may argue that the EPA should require reasonable assurances, the *Arcadia* court noted that it would be extremely difficult for the EPA to oversee every TMDL implementation because it would leave no latitude for the state to

implement the plan. *See City of Arcadia v. U.S. Env't Prot. Agency*, 265 F.Supp.2d 1153 (N.D. Cal. 2003). Here, if the EPA needs to oversee New Union's process only after the state has provided reasonable assurances as CLW may argue, then the determinations surrounding BMPs would hardly be left to the state as the CWA intends. *See* 296 F.3d at 1026; *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008). Furthermore, CLW has primarily relied on a guidance document that the EPA published suggesting that the state must give reasonable assurances that it will achieve the required implementations. Record at *[15]. However, the EPA has not changed its standard regarding implementation plans through the publishing of that document because such guidance documents do not have the effect of law. 296 F.3d at 1033. Therefore, the district court has not erred in rejecting CLW's reasonable assurances argument.

The EPA has designed BMPs to help states achieve implementation of TMDLs. When it comes to the planning of these implementation measures, the source of the pollution, whether point or nonpoint, does not matter. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1132-1133 (9th Cir. 2002). In fact, TMDLs themselves do not reduce pollution. *See id.* at 1128. Rather, they merely set a standard for the state to achieve, thereby making CLW's concern regarding New Union's lack of implementation an issue with the state and not with the EPA. *See Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (identifying that TMDLs simply set goals). Therefore, because there is no need for reasonable assurances regarding the state's implementation plan, the EPA's approval here is not an abuse of discretion.

CONCLUSION

Upon the foregoing, Appellant EPA respectfully requests that this Court reverse the District Court Judge and find that neither CLW nor New Union's arguments are ripe for judicial review. EPA respectfully asks this Court to affirm the District Court Judge's decision on the matter of No. 73-CV- 2020 and asks this Court to reverse and remand the order on the matter of No. 66-CV-2020.

APPENDIX TABLE OF CONTENTS

5 U.S.C. § 702
Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

5 U.S.C. § 704
Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706
Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1291
Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

33 U.S.C. § 1251(a)
Congressional Declaration of Goals and Policy

Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

33 U.S.C. § 1311(b)(1)(A)
Effluent Limitations

In order to carry out the objective of this chapter there shall be achieved— **(1)(A)** not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title.

33 U.S.C. § 1313(c)
Water Quality Standards and Implementation Plans

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

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

33 U.S.C. § 1313(d)(1)(A)
Water Quality Standards and Implementation Plans

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. § 1313(d)(1)(C)
Water Quality Standards and Implementation Plans

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

33 U.S.C. § 1313(d)(2)
Water Quality Standards and Implementation Plans

Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

33 U.S.C. § 1314(a)(2)
Information and Guidelines

(a) Criteria development and publication

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

33 U.S.C. § 1329(b)
Nonpoint Source Management Programs

(b) State management programs

(1) In general

The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents

Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

(C) A schedule containing annual milestones for (i) utilization of the program implementation methods identified in subparagraph (B), and (ii) implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (1)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.

(D) A certification of the attorney general of the State or States (or the chief attorney of any State water pollution control agency which has independent legal counsel) that the laws of the State or States, as the case may be, provide adequate authority to implement such management program or, if there is not such adequate authority, a list of such additional authorities as will be necessary to implement such management program. A schedule and commitment by the State or States to seek such additional authorities as expeditiously as practicable.

(E) Sources of Federal and other assistance and funding (other than assistance provided under subsections (h) and (i)) which will be available in each of such fiscal years for supporting implementation of such practices and measures and the purposes for which such assistance will be used in each of such fiscal years.

(F) An identification of Federal financial assistance programs and Federal development projects for which the State will review individual assistance applications or development projects for their effect on water quality pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983, to determine whether such assistance applications or development projects would be consistent with the program prepared under this subsection; for the purposes of this subparagraph, identification shall not be limited to the assistance programs or development

projects subject to Executive Order 12372 but may include any programs listed in the most recent Catalog of Federal Domestic Assistance which may have an effect on the purposes and objectives of the State's nonpoint source pollution management program.

(3) Utilization of local and private experts

In developing and implementing a management program under this subsection, a State shall, to the maximum extent practicable, involve local public and private agencies and organizations which have expertise in control of nonpoint sources of pollution.

(4) Development on watershed basis

A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State.

33 U.S.C. § 1362(14)
Definitions

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

40 C.F.R. § 122.23
Concentrated Animal Feeding Operations

(a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12–month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) Concentrated animal feeding operation ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) Large concentrated animal feeding operation ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term manure is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.
(6) Medium concentrated animal feeding operation ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:
(i) The type and number of animals that it stables or confines falls within any of the following ranges:
(A) 200 to 699 mature dairy cows, whether milked or dry;
(B) 300 to 999 veal calves;
(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
(D) 750 to 2,499 swine each weighing 55 pounds or more;
(E) 3,000 to 9,999 swine each weighing less than 55 pounds;
(F) 150 to 499 horses;
(G) 3,000 to 9,999 sheep or lambs;
(H) 16,500 to 54,999 turkeys;
(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and
(ii) Either one of the following conditions are met:
(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.
(7) Process wastewater means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.
(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area

includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.
(9) Small concentrated animal feeding operation (“Small CAFO”). An AFO that is designated as a CAFO and is not a Medium CAFO.
(c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.
(1) Who may designate?
(i) Approved States. In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.
(ii) States with no approved program. The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.
(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:
(i) The size of the AFO and the amount of wastes reaching waters of the United States;
(ii) The location of the AFO relative to waters of the United States;
(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
(v) Other relevant factors.
(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:
(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or
(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.
(d) NPDES permit authorization.—
(1) Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or

operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.
(2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.
(3) Information to submit with permit application. A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.
(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.
(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).
(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.
(f) By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges.
(g) [Reserved by 77 FR 44497]
(h) Procedures for CAFOs seeking coverage under a general permit.
(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of

the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.
(2) For EPA–issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.
(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).
(i), (j) [Reserved by 77 FR 44497]

40 C.F.R. § 130.2(i)
Definitions

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. 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. § 130.7(a)

Total maximum daily loads (TMDL) and individual water quality-based effluent limitations
(a) General. The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLAs/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State's list of segments identified, priority ranking, and loads established (WLAs/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State's WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP).

40 C.F.R. § 130.7(d)

Total maximum daily loads (TMDL) and individual water quality-based effluent limitations

(d) Submission and EPA approval.

(1) Each State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section. For the 1992 biennial submission, these lists are due no later than October 22, 1992. Thereafter, each State shall submit to EPA lists required under paragraph (b) of this section on April 1 of every even-numbered year. For the year 2000 submission, a State must submit a list required under paragraph (b) of this section only if a court order or consent decree, or commitment in a settlement agreement dated prior to January 1, 2000, expressly requires EPA to take action related to that State's year 2000 list. For the year 2002 submission, a State must submit a list required under paragraph (b) of this section by October 1, 2002, unless a court order, consent decree or commitment in a settlement agreement expressly requires EPA to take an action related to that State's 2002 list prior to October 1, 2002, in which case, the State must submit a list by April 1, 2002. The list of waters may be submitted as part of the State's biennial water quality report required by § 130.8 of this part and section 305(b) of the CWA or submitted under separate cover. All WLAs/LAs and TMDLs established under paragraph (c) for water quality limited segments shall continue to be submitted to EPA for review and approval. Schedules for submission of TMDLs shall be determined by the Regional Administrator and the State.

(2) The Regional Administrator shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission. The Regional Administrator shall approve a list developed under § 130.7(b) that is submitted after the effective date of this rule only if it meets the requirements of § 130.7(b). If the Regional Administrator approves such listing and loadings, the State shall incorporate them into its current WQM plan. If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS. The Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings. After considering public comment and making any revisions he deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan.