TEAM 54

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

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant-Appellant.*

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

Brief of Appellant, CHESAPLAIN LAKE WATCH

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INTRODUCTION

Congress created the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This case concerns whether or not the Environmental Protection Agency (EPA) and the State of the New Union have acted in accordance with the statute in terms of both the explicit language, Congressional intent, and overall purpose of the CWA. This is also a case about administrative law and how it applies to the review of environmental issues and agency action.

In the past several years, Lake Chesaplain has transformed from a pristine, beautiful body of water to one suffering from excessive algae growth, a decrease in dissolved oxygen, and phosphorus levels over double the standard amount for a healthy lake ecosystem. Record at 8. Just over 10 years ago, Lake Chesaplain was designated as a Class AA water, a distinction reserved only for the highest quality waters in the state. *Id.* Now, the lake is classified as an "impaired water," which necessitates the adoption and implementation of more stringent water quality standards. *Id.*

Both EPA and the State of the New Union have an opportunity to reverse the damage done to Lake Chesaplain. However, these actors can only restore the lake's ecological and economic benefits by complying with the CWA. Yet, EPA's current TMDL violates the statute for several reasons. First, EPA's TMDL does not include "daily" limits on loading which the CWA requires for the achievement of water quality goals. Record at 9. Further, EPA has designed a TMDL that is a faulty informational tool because it does not consider the lack of implementation of Best Management Practices (BMPs) to reduce pollution. Record at 10.

As the current plan stands, Lake Chesaplain will not return to its pristine state any time soon. The Clean Water Act was designed to protect and enhance the Nation's water quality, and that goal is at the center of our case.

JURISDICTIONAL STATEMENT

Chesaplain Lake Watch (CLW) appeals from an Order granting partial summary judgment for defendant EPA and the State of New Union, entered on August 15, 2021, by the United States District Court for the District of New Union, No. 66-CV-2020 and No. 73-CV-2020 (consolidated cases). CLW, the State of New Union, and EPA each filed a timely Notice of Appeal. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision, and thus appealable. *Bullard v. Blue Hills Bank*, 135 U.S. 1686, 1694 (2015).

STATEMENT OF ISSUE PRESENTED

I. Is 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 ripe for judicial review?

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

III. Is 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 in violation of the CWA § 303(d) requirements for a valid TMDL?

IV. Is 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 arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation?

STATEMENT OF THE CASE

1. Clean Water Act

The CWA established a comprehensive system of regulation of point source discharges of pollutants into the waters of the United States. 33 U.S.C. § 1362(14). Nonpoint source discharges are not directly regulated under the Act. *See* 33 U.S.C. §1251 et seq. Under the CWA, the EPA establishes national standards, but leaves to the states implementation of permitting, *see* 33 U.S.C. § 1342(b), and water quality improvement, *see* 33 U.S.C. §§ 1288, 1313.

Under the CWA, each state must adopt and periodically revise water quality standards (WQS) for waters within its boundaries. 33 U.S.C. § 1313(a)-(c). A WQS prescribes the appropriate uses for a body of water, as well as the water quality criteria in either numerical or narrative form necessary to support designated uses. *See* 33 U.S.C. § 1313(c)(2)(A)-(B); 40 C.F.R. § 131.3(b). A state must identify, and biennially review and update, a list of its waters that do not meet the WQS. 40 C.F.R. § 130.7(d).

Once a body has been included on this list of impaired waters, CWA § 303(d) requires that the state develop and submit to EPA a "total maximum daily load" (TMDL) for offending pollutants. 33 U.S.C. § 1313(d). The TMDL should be "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)(1)(C). EPA regulations define 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). This means that a state must not only establish a total amount of a pollutant permissible for a body of water, but also allocate that total amount among regulated point sources, considering both natural background sources and nonpoint sources. A state may make wasteload allocations less stringent where it takes credit for nonpoint source pollution reductions achieved through BMPs or other nonpoint source controls. 40 C.F.R. § 130.2(i).

EPA may review, approve, or reject any step in the water quality standards process as outlined above. *See* 33 U.S.C. §§ 1313(c)(3)-(d)(2). The agency may develop its own WQS, list of impaired waters, or TMDLs where appropriate. *Id*.

2. Lake Chesaplain's ecological integrity is of paramount importance to the local community and regional economy.

Lake Chesaplain has historically supported diverse regional economic activities by both providing natural resources and ecological services and drawing a local workforce and tourist-spending. *See* Record at 7. The Lake's shores sustain timber harvest and agriculture. *Id.* The Lake Chesaplain watershed hosts ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs). *Id.* A high-volume slaughterhouse at the north end of the lake services these operations. *Id.* Lake Chesaplain's waters also draw significant tourism and outdoor recreation. *Id.* The Lake's clear, clean waters have historically attracted boaters, fishers, beach-goers, campers, and hikers from the entire mid-north region of the

country. *Id.* Recreational attractions have drawn many to build second homes on the Lake's eastern shore, supporting the local construction industry. *Id.*

Additionally, Lake Chesaplain directly impacts the health of locals. *See generally id.* at 7-8. As a Class AA body of water, Lake Chesaplain is designated for drinking water in New Union and for primary contact recreation, like swimming. *Id.* at 8. Because residents are likely to ingest or come in direct contact with the Lake's waters, the integrity of these waters bears directly on their health. *See id.* Moreover, Lake Chesaplain's peaceful waters and recreational opportunities have historically provided residents and visitors alike mental health benefits and a sense of connection to the region's natural history. *See id.* at 7-8.

3. Lake Chesaplain's waters are significantly degraded by phosphorus pollution from industry and development.

Prior to 1900, Lake Chesaplain had excellent water quality. *Id.* at 7. Beginning in the 1990s, however, the watershed experienced an increase in economic development, and with it greater pollution. *Id.* During this period, the CAFOs and slaughterhouse were developed, and second home construction surged. *Id.* These second homes were, and are largely served by, septic systems. *Id.*

By the late 2000s, the Lake had heavy algae, reduced clarity, decreased dissolved oxygen levels, and foul odors. *Id.* Fish productivity waned, local beaches became unsuitable for swimming, recreation ceased to bring in as much revenue, and property values declined. *Id.* The Chesaplain Commission issued a 2012 report confirming that the Lake was suffering from eutrophication due to excessive phosphorus in the water. *Id.* at 8. The Commission determined that the maximum healthy phosphorus level would be 0.014 mg/l throughout the lake. *Id.* Measurements indicated, however, that phosphorus levels in the lake were significantly over this level, ranging from 0.020 to 0.034 mg/l. *Id.*

4. State regulators and operators of regulated phosphorus sources resisted real compliance with the CWA.

In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a water quality criteria for the Lake of 0.014 mg/l of phosphorus. *Id.* Lake Chesaplain was not in compliance, so DOFEC included the Lake on the list of impaired waters it submitted to EPA in 2014. *Id.* DOFEC did not, however, submit a TMDL for Lake Chesaplain. *Id.* EPA failed to object to this, and DOFEC did not initiate rulemaking on a TMDL until Chesaplain Lake Watch brought attention to this failure. *Id.*

In advance of the TMDL rulemaking, the Chesaplain Commission issued a supplemental report in 2016 identifying phosphorus inputs into the Lake and maximum phosphorus loadings consistent with achieving the 0.014 mg/l standard. *Id.* The report identified a maximum loading of 120 metric tons (mt) annually, *id.*, as well as acceptable loadings from the following sources: point sources at Chesaplain Mills Sewage Treatment Plant (23.4 mt), *id.*, and Chesaplain Slaughterhouse (38.5 mt), *id.*; nonpoint sources of CAFO Manure Spreading (54.9 mt), *id.* at 9, agricultural sources (19.3 mt), *id.*, and septic tank inputs (11.6 mt), *id.*; and natural sources (32.3 mt). *Id.* The report emphasized that CAFOs were responsible for substantial phosphorus loading into the Lake, despite having been classified as "non-discharging" and not being subject to CWA permits. *Id.* Despite compliance with state mandated nutrient management plans and the CWA exemption for agricultural stormwater runoff, significant quantities of phosphorus travelled from these facilities to the Lake. *Id.*; *see* 33 U.S.C. § 1362(14). The report also identified that significant phosphorus loading was attributable to private home septic systems, despite their exemption from CWA permitting because they discharge to groundwater rather than directly to surface water. Record at 9. Additionally, the report observed that neither the slaughterhouse nor the sewage treatment plant had permit limits for phosphorus. Record at 9. (As of writing this

brief, both the Slaughterhouse and Sewage Treatment Plant are operating under expired NPDES permits, and neither is subject to phosphorus discharge limits. See 40 C.F.R. § 122.6.) *Id.* at 10.

In October 2017, DOFEC published a notice of a proposal to implement the TMDL through a phased 35% reduction in phosphorus discharges from point and nonpoint sources over five years, starting at a baseline of 180mt. *Id.* at 9. The point source reductions would be integrated as permit limits. *Id.* Nonpoint source reductions would be accomplished through a series of BMP programs focused on agricultural, CAFO, and private septic system sources. *Id.* Despite the unchallenged scientific urgency behind these proposals, the operators of point and nonpoint sources vigorously protested their perceived impositions to their businesses and activities. *Id.* Ultimately, DOFEC acquiesced to these protests and adopted a TMDL in July 2018 that consisted solely of a 120 mt annual phosphorus maximum. *Id.* at 10. The TMDL did not include wasteload or load allocations. *Id.*

5. EPA adopted DOFEC's insufficient TMDL for Lake Chesaplain.

EPA rejected the July 2018 TMDL, pursuant to CWA § 303(d)(2). *Id.* In May 2019, after notice and comment, EPA adopted the original DOFEC TMDL proposal, which included the five-year phased phosphorus reduction plan. *Id.* This was to be achieved through a combination of permit controls at point sources and BMP requirements for nonpoint sources. *Id.* No enforcement plan was specified for the BMP measures. *Id.* To date, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources. *Id.* New Union's nutrient management permits for the hog CAFOs have also not been modified to incorporate any phosphorus reduction measures. *Id.*

Additionally, DOFEC has proposed to modify the permits for both the slaughterhouse and sewage treatment plant to reflect the phased 35% annual phosphorus loading reduction, but

these facilities have sought administrative hearings to challenge this on the basis of cost of compliance. *Id.* To date, Lake Chesaplain's waters continue to violate established water quality standards. *Id.*

6. The proceedings

At the District Court, New Union challenged EPA's rejection of its proposed TMDL consisting solely of the 120 mt/year total loading for the Lake Chesaplain watershed. *Id.* at 11. It asserted that EPA's interpretation of "total maximum daily load" to include wasteload and load allocations violated CWA § 303(d). *Id.* Chesaplain Lake Watch challenged the selected TMDL because 1) it incorporated phased percentage reduction in annual loadings, rather than a fixed daily limit on total loadings, and 2) EPA improperly took credit for phosphorus load allocation reductions anticipated from the implementation of BMPs for nonpoint sources. *Id.* EPA disagreed with the merits of both plaintiffs' claims and argued that the complaints should be dismissed for lacking ripeness. *Id.*

The District Court determined that the claims raised were fit for adjudication and that plaintiffs New Union and Chesaplain Lake Watch would be prejudiced if the validity of EPA's Lake Chesaplain TMDL were not subject to immediate judicial review. *Id.* at 12. The court ultimately granted summary judgment to Chesaplain Lake Watch and held that an annual pollution loading reduction to be phased in over five years violated the CWA at § 303(d). *Id.* at 15. The court granted summary judgment in favor of New Union on the other matters. *Id.* at 14-16. It determined 1) that EPA's interpretation of the term "total maximum daily load" to include both wasteload and load allocations violated the CWA at § 303(d), *id.* at 14, and 2) that EPA's decision to provide a credit for nonpoint source pollution reductions through implementation of BMPs was not arbitrary or capricious or an abuse of discretion. *Id.* at 16. It vacated EPA's

determination to reject New Union's Lake Chesaplain TMDL and ordered the agency to reinstate that version of the TMDL. *Id.*

In the present proceedings, Chesaplain Lake Watch appeals from these determinations. *Id.* at 2.

SUMMARY OF THE ARGUMENT

The district court was correct in holding that this case was ripe for review. However, it was incorrect in holding that EPA's interpretation of the term "total maximum daily load" (TMDL) to include wasteload and load allocations was contrary to law. In contrast, the district court was correct in holding that EPA's TMDL contradicts the CWA by not including "daily" limits. Finally, the court was incorrect in finding that 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 was not arbitrary and capricious.

This case is ripe for review because delayed review of the matter will cause hardship to the plaintiffs and the issues are fit for judicial decision without inappropriately interfering with administrative action. To begin with, the TMDL in question causes harm to the plaintiffs: the TMDL contemplates specific National Pollutant Discharge Elimination System (NPDES) permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay, as the issuer of NPDES permits within the State of New Union. Moreover, since EPA's adoption of the Lake Chesaplain TMDL, Lake Chesaplain waters have continued to violate water quality standards for the past two years, in stark contrast to the advocacy goals of the Chesaplain Lake Watch organization. Secondly, the issues are fit for judicial review because the parties have presented a purely legal dispute on a well-developed administrative record. No questions of fact or scientific complexity remain to be decided, this

case simply revolves around a legal dispute. Moreover, the court will not inappropriately interfere with administrative action because EPA has finished its decision-making process on the implementation of new standards.

The district court was incorrect in determining that EPA's rule defining the term "total maximum daily load" to require wasteload allocations and load allocations was contrary to law. Rather, EPA's interpretation of the term is owed deference under the two-step framework introduced by *Chevron, U.S.A, Inc. v. NRDC, Inc.* 467 U.S. 837 (1984). At "Step One" of *Chevron*, the court asks whether "Congress has directly spoken to the precise question at issue." *Id.* at 842-43. If there is any ambiguity as to Congress's intent on the relevant question, then the courts may proceed to "Step Two," where the court asks whether "the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose." *Id.* at 837.

As to the first *Chevron* step, the CWA does not provide a clear definition for a "total maximum daily load," nor does it indicate Congressional intent to exclude wasteload allocations and load allocations from TMDLs. First, the word "total" is susceptible to multiple interpretations, including that of a sum of constituent parts, like wasteload and load allocations. Additionally, the CWA states that a TMDL should take into account considerations like "seasonal variations" and "the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). It would be nonsensical for the statute to require consideration of factors impacting pollutant loadings from individual sources, to then intentionally exclude that information from a final TMDL. Moving to the second step of *Chevron*, EPA's interpretation reasonably accords with the purpose of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" 33 U.S.C. § 1251(a), as a TMDL must be detailed

enough to lay the groundwork for real water quality improvement. Therefore, EPA's interpretation of a TMDL requiring wasteload and load allocations is not contrary to law.

The district court was correct, however, in holding that EPA's TMDL contradicts the CWA by not including "daily" limits. The TMDL in question is framed as a phased percentage reduction in annual loadings, rather than a fixed daily limit on total loadings, which is necessary to provide for achievement of water quality standards. Record at 9. In accordance with *Chevron*, the statute is clear and unambiguous in regard to requiring a "daily" and not annual reductions. Therefore, the issue does not warrant deference to EPA, and Congress's directive controls through the explicit language of the statute. Further, the TMDL contradicts the overall purpose of the CWA, which states that TMDLs must be adequate to ensure achievement of water quality standards. A TMDL that is structured as a phased-reduction plan, which will not meet its intended goals until five years past implementation, directly contradicts the CWA's focus on achieving water quality standards from the date of adoption.

Further, although the district court erroneously held otherwise, EPA's decision to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance was arbitrary and capricious. To overcome this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action," such as a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). In this case, the "relevant data" in the rulemaking record explicitly illustrates that the Lake Chesaplain TMDL could not be accomplished without a commitment to reduction in non-point sources through BMPs. This is because the record shows that the largest source of pollution was found to be coming from non-point sources released from CAFO manure

spreading, other agricultural sources, and septic tank inputs that would not be regulated through other mechanisms of the Clean Water Act. Record at 9. These conclusions were not subject to substantive challenge. *Id.* However, due to political pressure, the DOFEC ultimately adopted the Hog CAFO's position and adopted a TMDL without any wasteload allocations or load allocations. *Id.* EPA immediately saw that these positions were untenable if they were going to accomplish the goals of the CWA. Therefore, EPA explicitly rejected the July 2018 DOFEC TMDL and instead adopted the original DOFEC TMDL proposal. Yet, EPA explicitly failed to consider an important aspect of the problem - whether or how the proposed BMP measures would be enforced, even though the rulemaking record explicitly emphasizes the importance of BMP implementation.

More specifically, the agency did not articulate a satisfactory explanation for not requiring reasonable assurance that BMPs would be achieved. Not one sentence of the rulemaking record discusses how or whether the proposed BMP measures would be enforced. Although TMDLs are important informational tools that are essential for EPA to "serve as a link in the implementation chain" to attain the goals of the CWA, *Sierra Club v. Meiburg*, 296 F. 3d 1021, 1023 (11th Cir. 2002) and must be designed at a "level necessary to *implement* the applicable water standards," *Pronsolino v. Nastri*, 291 F. 3d 1123, 1129 (9th Cir. 2002), the EPA explicitly adopted a TMDL which depended on the regulation of non-point sources through BMPs that would simply not be enforced. The rulemaking record fails to explain this choice; it is unclear whether and how EPA thought such a level of discharge pollutant could be achieved through the TMDL. As it stands, it appears that EPA designed an informational tool that was ultimately inefficient, for it is unable to accomplish a level necessary to implement the applicable water standards under the CWA. For these reasons, EPA's decision to suggest nonpoint source

BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance was arbitrary and capricious.

ARGUMENT

1. The EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review because the plaintiffs face significant hardship and the issues presented are purely legal disputes on a comprehensive record.

Ripeness is a jurisdictional prerequisite. Whether a claim is ripe for judicial review is a question of law which a court of appeals reviews de novo. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2010).

EPA's determination to reject the New Union Chesaplain Watershed phosphorous TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review because both CLW and New Union face significant hardship and the issues presented are purely legal disputes on a well-developed record.

In determining whether a pre-enforcement challenge to a regulation is ripe for review, a court must consider two main issues: "the hardship to the parties of withholding court consideration" and "the fitness of issues for judicial decision." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). Further, to address these issues in the context of a challenge to an administrative action, the court will specifically consider: "(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).

For example, in *American Farm Bureau Federation v. United States*, the court held that a challenge to an unenforced TMDL was ripe for review because it was a purely legal dispute and it would cause multiple parties to incur hardship in anticipation of its implementation. 792 F. 3d, 281, 281 (3d. Cir. 2015). In that case, trade associations claimed that EPA exceeded its statutory authority by promulgating a TMDL that included measures such as deadlines for completion. *Id.* at 292. In considering ripeness, the court emphasized that the parties presented "a purely legal dispute on a well-developed record" that was therefore fit for judicial review. *Id.* As to the hardship the parties could the suffer, the court noted that while the TMDL would not be enforced until it was implemented as part of the state's continuing planning process, members of the trade association would still have to limit their discharge of pollutants "in anticipation of the TMDL's implementation." *Id.* at 293. Further, the court emphasized that it would impose hardship on EPA and the states not to hear the dispute now because they had to spend time and money on developing an implementation plan. *Id.*

Similarly, in *Whitman v. American Trucking Ass'n, Inc*, the court concluded that an association's challenge to a new air quality standard was ripe because EPA had concluded its consideration of the air quality standards, therefore ensuring that the court did not interfere inappropriately with administrative action. 531 U.S. 457, 479 (2001). In that case, the association specifically challenged a new air quality standard promulgated by EPA which revised the standards for particulate matter and the ozone. *Id.* at 463. As to the first factor, the court noted that the states would be forced to promptly undertake the lengthy and expensive task of developing state implementation plans that would attain the more stringent air quality standard. *Id*. at 479. As to the second factor, the court emphasized that because EPA had finished its decision-making process on the implementation of the new air quality standards, judicial review

would not inappropriately interfere with further administrative action. Finally, as to the third factor, the court reiterated that because the question was "purely one of statutory interpretation," it would not benefit from further factual development of the issues presented. *Id.* at 479.

In contrast, in *City of Arcadia v. United States EPA*, the court held that the challenged administrative action was not ripe for review because the TMDLs had not been implemented by the states yet, therefore not presently imposing any hardships on the plaintiffs and leaving open the possibility of revision. 65 F. Supp 2d 1442, 1157-59 (9th Cir. 2003). In that case, plaintiffs sued EPA for declaratory and injunctive relief, alleging that a number of EPA actions, such as the manner by which it established state trash TMDLs, were arbitrary and capricious and in excess of its jurisdiction. *Id.* at 1149. The court found that the plaintiffs could not point to a future event or condition that was likely to harm them because the TMDLs did "not presently impose any obligations on Plaintiffs" and because they were "subject to revision before such obligations [would] be imposed." *Id.* at 1157. The court emphasized that even if plaintiffs were forced to comply with the obligations imposed by the State Trash TMDLs, they had three years to reach the compliance point and therefore "ample opportunity later to bring their legal challenge at a time when harm is more imminent and more certain." *Id.* at 1157 (quoting *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 734). Further, the court noted that it was possible that the state board could submit new TMDLs to the EPA for review and approval before the compliance dates with the State Trash TMDLs or approve additional regulations that alleviate the burden on plaintiffs. *City of Arcadia*, 265 F. Supp 2d at 1159. Finally, the court concluded that since TMDLs require issuance of state regulations for implementation, delaying review would allow the court to determine whether plaintiffs' claim that EPA failed to use the best science to structure the TMDL program was accurate. *Id.*

In this case, 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. To begin with, as the district court notes, delayed review of the matter causes hardship to the plaintiffs. *See Am. Farm Bureau Fed'n,* 792 F. 3d at 293. While the court held in *Arcadia* that the challenged administrative action was not ripe for review because the TMDLs had not been implemented by the states yet, therefore not presently imposing any hardships on the plaintiffs, the TMDL in question here contemplates specific NPDES permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay, as the issuer of NPDES permits within the State of New Union. *See City of Arcadia,* 265 F. Supp 2d at 1157-59. Moreover, 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 and Lake Chesaplain waters have continued to violate water quality standards for the past two years, in stark contrast to the advocacy goals of the Chesaplain Lake Watch organization. Record at 10.

Secondly, the issues are fit for judicial review and the courts would not benefit from development of the issues presented, because similarly to *American Farm Bureau,* the parties here have presented "a purely legal dispute on a well-developed record." *See* 792 F. 3d at 281; *Abbott Lab'ys,* 387 U.S. at 149; *Ohio Forestry Ass'n, Inc.,* 523 U.S. at 733. Similar to *Abbott Labs,* where the court found that no questions of fact remain to be decided in the case and were therefore ready to be adjudicated, this case revolves around questions of statutory interpretation and the review of agency actions under the Administrative Procedure Act. *See* 387 U.S. at 137. In contrast to the record in *City of Arcadia* where the court wanted to review EPA's

scientific choices around the structure of the TMDL program, in this case, there are no complex technological or scientific questions. *See* 265 F. Supp 2d at 1159.

Finally, judicial intervention would not inappropriately interfere with administrative action because as in *Whitman*, EPA has finished its decision-making process on the implementation of new standards. *See* 531 U.S. at 479. In contrast to *City of Arcadia*, where the court held that judicial intervention could interfere with administrative action because the states could submit the TMDLs to EPA for review and approval before the compliance dates with the State Trash TMDLs or approve additional regulations, EPA has already gone through the rulemaking process and decided to reject the New Union's proposed TMDL. *See* 65 F. Supp 2d at 1159; Record at 10.

For the foregoing reasons, this case is ripe for judicial review.

2. EPA's rule defining the term "total maximum daily load" to require wasteload allocations and load allocations is owed deference under the *Chevron* framework, as it speaks to a gap in the Clean Water Act and more than reasonably accords with the purpose and structure of the Act.

Assessing whether EPA's interpretation of the term "total maximum daily load" is contrary to law is a matter of statutory interpretation, which is purely a question of law. These questions are reviewed de novo by the appellate court. *Galindo v. Stoody Co*., 793 F.2d 1502, 1508 (9th Cir. 1986).

EPA properly rejected New Union's proposed phosphorus TMDL for Lake Chesaplain consisting solely of 120 mt/year total loading for the Lake Chesaplain watershed because New Union neglected to incorporate wasteload allocations and load allocations. Record at 10. EPA's interpretation of the term "total maximum daily load" is owed deference under *Chevron*, as the

CWA does not speak directly to the definition of a TMDL and the agency's rule defining the term is patently reasonable given the purpose and structure of the Act.

The CWA states that a TMDL should be "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)(1)(C). The courts consider TMDLs to be thorough "informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." *Pronsolino,* 291 F.3d at 1129. It is against this backdrop that EPA's regulations define 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 this action, New Union brings an "as applied" challenge to EPA's regulation defining a TMDL to include wasteload and load allocations. *See* 5 U.S.C. § 704; *Dunn-McCampbell Royalty Int. v. Nat'l Park Serv*., 112 F.3d 1283, 1287 (5th Cir. 1997) ("[W]hen an agency applies a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority."). The parties agree that this challenge is to be reviewed under the framework in *Chevron, U.S.A, Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984).

In step one of *Chevron*, courts ask whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In assessing this step, the courts ask "whether the statute unambiguously forbids the Agency's interpretation." *Barnhart v. Walton,* 535 U.S. 212, 213 (2002). If there is any ambiguity as to Congress's intent on the relevant question, then the courts may proceed to step

two. In this step, 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. The question for the court is whether "the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose." *Id.* at 837.

a. *Chevron* step one: the CWA is ambiguous as to the requirements for a TMDL, and it does not speak to an intent to exclude allocations among sources.

Judges across the other appellate courts have consistently applied EPA's definition of a TMDL. They have not indicated that the rule might infringe upon, as New Union alleges, an unambiguous statutory reading of the term. *See, e.g., Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017, 1021 (10th Cir. 2001); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). Moreover, the CWA jurisprudence consistently affirms EPA's authority to fill in the statute's significant gaps on how to promulgate a TMDL. *See Pronsolino*, 291 F.3d at 1131 ("[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.").

However, EPA's room for interpretation of the CWA is not without bounds. In *Friends of the Earth, Inc. v. EPA*, the court held that the statutory language was unambiguous in regard to the term "daily," and challenged EPA's practice of promulgating TMDLs on a seasonal or annual basis. 446 F.3d 140, 142 (D.C. Cir. 2006). Courts have consistently applied EPA's interpretation of the term "total maximum daily load" to include wasteload and load allocations; this should be regarded as intentional deference to EPA's interpretation.

Here, the text of the CWA is ambiguous as to what a TMDL should require in terms of total load, and it does not indicate Congressional intent to exclude wasteload and load allocations from a TMDL. The term "total maximum daily load" is not defined in the statute, and courts have pointed out that the word "total" is susceptible to multiple interpretations, including the concept of a sum of constituent parts. *Am. Farm Bureau Fed'n,* 792 F.3d at 298. Here, one natural interpretation of "total" is the sum of various pollutant loading allocations among point and nonpoint sources. This flexibility contradicts the notion that Congress specifically intended to exclude allocations from a TMDL.

Further, the CWA states clearly that the drafters of a TMDL should consider factors like "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)(1)(C). In *American Farm Bureau,* the court pointed out that "it would be strange to require the EPA to take into account these specific considerations but at the same time command the agency to excise them from its final product… If anything, [these] requirements… tend to suggest that 'total maximum daily load' is a term of art meant to be fleshed out by regulation, and certainly something more than a number." 792 F.3d at 298. It would be nonsensical for the CWA to require consideration of factors impacting individual polluting sources, and then to require that detailed information be excluded from a final TMDL.

Because the language of the CWA is both ambiguous as to the specific requirements of a TMDL and directly contradicts New Union's assertion that Congress intended for a TMDL to exclude allocations, we move to step two of *Chevron*.

b. Chevron step two: EPA's rule reasonably aligns with the purpose of the CWA.

Step two of *Chevron* requires only that an agency's interpretation under a statute is reasonable, given factors like the purpose or structure of the act. 467 U.S. at 837. Here, EPA's interpretation of the term "total maximum daily load" to include wasteload and load allocations is more than reasonable in the context of the purpose of the CWA. Broadly speaking, the purpose of the CWA is that it "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Ark. v. Okla.*, 503 U.S. 91, 101 (1992) (citing 33 U.S.C. § 1251(a)). Requiring that a TMDL include wasteload and load allocations aligns with this purpose. Without information about appropriate allocation among point and nonpoint sources, it would be nearly impossible to translate water quality goals into reality, thus frustrating the aims of the CWA. Again, courts consider TMDLs to be thorough "informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." *Pronsolino*, 291 F.3d 1123. Allocations within TMDLs lay the foundation for this planning.

New Union alleges that to require wasteload and load allocations in a TMDL would be to convert a mere information-gathering tool into something akin to an implementation scheme for the water quality standards. But this simply does not follow. The publication of allocation numbers does not alone translate to implementation or enforcement. This is borne out in the reality of Lake Chesaplain. Even after EPA adopted the 2019 TMDL, including allocations, no significant change to phosphorus loadings or to water quality came to be. Record at 10. Without further implementation planning, the more detailed information was merely that: information.

Because EPA's TMDL rule is fundamentally reasonable in light of the CWA's goals, and because the CWA does not speak directly to a definition for the term, EPA's definition is owed deference under *Chevron*. Given this, EPA properly rejected New Union's proposed phosphorus TMDL for Lake Chesaplain consisting solely of 120 mt/year total loading for the Lake Chesaplain watershed. Record at 10.

3. 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 because it goes against both the statutory language of the CWA and the overall purpose of the CWA and TMDL process.

Analyzing whether a TMDL's lack of daily limits violates the CWA is a matter of statutory interpretation, which is purely a question of law. Issues on appeal that are pure questions of law are reviewed de novo by the appellate court. *Galindo v. Stoody Co.*, 793 F.2d at 1508.

The District Court was correct in holding that EPA's adopted TMDL violates the CWA because it lacks "daily" limits, which are a clear and unambiguous requirement of CWA § 303(d). The current TMDL consists of a thirty-five percent reduction to be phased in over five years. Record at 9. This type of annual reduction plan is inconsistent with the CWA, which, by statutory terms, requires TMDLs to include daily limits based on the scientific calculation without a phased implementation. Further, EPA's TMDL goes against CWA's overall purpose, since TMDLs must be adequate to ensure achievement of water quality standards on the date of adoption, not five years later through a phased implementation.

The CWA's statutory language is plain and clear in requiring that a TMDL is stated in terms of a "daily" maximum load, not an annualized load. In the CWA § 303(d), the statute holds that each state shall establish:

> "the total maximum daily load, for those pollutants. . .[and] 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)(1)(C).

Because this again involves a question of statutory interpretation, we return to *Chevron's* two-step analysis. 476 U.S. at 837. Although the question of "total" load is ambiguous and therefore proceeds to step two in the *Chevron* analysis, an interpretation of "daily" load is straightforward and unambiguous. Therefore, the issue here stops at step one, and EPA is not warranted any deference.

Additionally, allowing for a yearly, phased-in reduction plan does not align with the purpose of the CWA. According to the statute, a TMDL must "be established at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). Further, the TMDL calculation is designed to form the basis of effluent limitations on point sources, and the CWA's July 1, 1977 deadline for achievement of effluent limitations is a hard deadline that may not be extended by administrative action. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976) (noting that EPA may not grant a five-year extension for achievement of water quality standards when the statutory deadline has long since passed.)

Legislative intent is important when analyzing the issue of TMDLs, and Congress chose the word "daily" for a reason. Many courts who have discussed this question have come to the same consensus - the CWA requires a "daily" maximum load, and setting only annual or average limits is a direct violation of the statute.

In *Friends of the Earth, Inc. v. EPA*, the court held that, "the CWA unambiguously require[s] the establishment of daily loads for waters failing to achieve water quality standards. . .[and] the Environmental Protection Agency (EPA) c[an] not approve seasonal or annual loads."

446 F.3d at 140. In this case, Friends of the Earth petitioned for review of EPA's decision to approve certain TMDLs for pollutants discharged into the Anacostia River, alleging that the disputed TMDLs violated the CWA by not limiting daily discharges. *Id.* at 140. The court concluded that, "nothing in th[e statutory] language even hints at the possibility that the EPA can approve total maximum 'seasonal' or 'annual' loads," because, "the law says 'daily' [and there is] nothing ambiguous about this command." *Id.* at 144. It also held that, "if Congress wanted seasonal or annual loads, it could easily have authorized them by calling for 'total maximum daily, seasonal, or annual loads,'" but instead, "Congress specified total maximum *daily* loads [and] [the court] cannot imagine a clearer expression of intent." *Id; see also Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (where the court rejected EPA's interpretation [of an Act] in favor of the strict statutory language and stated that, "the most reliable guide to congressional intent is the legislation the Congress enacted.") Although EPA attempted to justify their decision by stating that the CWA called for a more flexible understanding of the word "daily" due to the variety of ways that pollutants can harm the environment, the court held its position that EPA could not simply set aside the statute's clear language because there is better policy or it might lead to undesirable consequences in some situations. *Friends of the Earth*, 446 F.3d at 145.

Similarly, the court in *Anacostia Riverkeeper, Inc. v. Wheeler* concluded that EPA cannot calculate TMDLs by using average flow rates instead of daily limits. 404 F.Supp.3d 160, 160 (D.D.C. 2019). In this case, Anacostia Riverkeeper brought an action alleging that EPA violated the CWA by approving TMDLs that failed to set appropriate daily maximum loads. *Id.* at 170. The TMDLs in question established both average annual loads and maximum monthly loads for fecal bacteria, which EPA approved even though the loads did not express the TMDLs in daily terms. *Id.* at 168. The court held that EPA, "violated the plain text of the CWA when it approved

'total maximum daily loads' that did not establish daily maximum discharge limits." *Id.* at 164. The court used the same reasoning behind *Friends of the Earth* and held that the meaning behind the phrase "total maximum daily load" is unambiguous.

The court in *Anacostia Riverkeeper* also spoke to the overall purpose of the CWA, and that daily maximum limits are required to achieve water quality standards. It noted that, the 'total maximum daily load' (TMDL) in the Clean Water Act, "represents the greatest amount of a pollutant that can be discharged into a water body on any given day without causing a violation of the water quality standards." *Id.* at 172. The court stated that, "the statute's unambiguous text requires EPA to approve figures that . . . must be sufficiently low to ensure that, when complied with, the water quality standards are met," and that creating TMDLs is, "a two-step process. First, the TMDLs must be established; second, they must achieve the water quality standards." *Id.* at 175.

In our present issue, EPA's adopted TMDL is an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources, proposed to be phased in over a period of five years. Record at 9. Most important to this issue, it also lacks any daily maximum load limits, which violates the plain meaning of the CWA. When applying the *Chevron* analysis, the language of the statute is very clear when requiring a "daily" load, so the question stops at step one and Congress's directive controls. Unlike the statute's reference to "load," which can be interpreted in multiple ways, the term "daily" is clear and unambiguous. The word "daily" is distinctly different from other measurements of time such as "seasonal" or "annual," which Congress could have specified if that is what they intended. *Friends of the Earth,* 446 F.3d at 144. The issue is therefore resolved within the plain meaning of the CWA, and requires no question of deference, since "the law says 'daily' [and there is] nothing ambiguous about this

command." *Id*. Congress chose the word daily for a reason, and we "cannot imagine a clearer expression of intent." *Id.*

The TMDL in question is similar to the TMDL at the center of *Friends of the Earth*, which also excluded "daily" limits. Any TMDL that lacks "daily" limits is a violation of the CWA, since "nothing in th[e statutory] language even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads". *Id*. The court in *Anacostia Riverkeeper* came to a similar conclusion regarding TMDLs that fail to set appropriate daily maximum loads. In both *Anacostia* and the present issue, EPA has "violated the plain text of the CWA" by excluding daily maximum discharge limits. 404 F.Supp.3d at 164.

Further, the TMDLs in each case violate the overall purpose of the CWA. EPA's TMDL at issue is framed as a phased percentage reduction in annual loads, rather than a fixed daily limit on total loads (which is necessary to provide for achievement of water quality standards). Record at 9. The statutory text of the CWA states that, "the TMDL process requires States to . . . budget to each point source a daily discharge limit that will ensure compliance with the underlying water quality standards." *Id.* at 165. Further, the CWA requires that TMDLs be "sufficiently low to ensure that, when complied with, the water quality standards are met." *Id.* at 175. However, in the present TMDL, a final thirty-five percent reduction from the 180mt baseline will not be met until the fifth year, which is not fit to accomplish the water quality standards that the statute intends to be measured daily. Record at 9. The clear intent of the CWA is to create loading standards that achieve water quality standards quickly and effectively, not five years past adoption.

There is no ambiguity in the CWA's requirement for "daily" limitations. Congress chose the word "daily" to describe the relevant period of pollutant loading to be determined by the state

(or EPA), and this choice is reinforced by reference to "seasonal variations." An annual limit is not a daily limit and an annual limit does not allow for seasonal variations. Further, a TMDL that will not reach overall reduction until five years past the adoption date is not fit to meet the water quality standards emphasized in the CWA. Therefore, EPA's current TMDL violates the plain statutory language and the overall purpose of the CWA.

4. The EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious because the EPA failed to create a valid informational tool.

Questions of law, whether federal or state, are reviewed de novo. While a district court's decision to enter an injunction or not is reviewed for an abuse of discretion, *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998), the appellate court must review the rulings of law relied upon by the district court in awarding injunctive relief de novo. *Hilao v. Est. of Marcos*, 95 F.3d 848, 851 (9th Cir. 1996).

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 because EPA failed to create a TMDL that could coordinate a level of pollution necessary to meet the water quality standards required by the CWA.

The Administrative Procedure Act limits judicial review of agency action to decisions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To overcome this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action," such as a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43; *Burlington Truck Lines, Inc.*, 371 U.S. at 168. An agency will normally be considered arbitrary and capricious if:

> "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

Moreover, the reviewing court "should not attempt itself to make up for such deficiencies" and cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

For example, in *Motor Vehicle Manufacturers Ass'n,* the court held that the National Highway Traffic Safety Administration's (NHTSA) final rule rescinding a passive restraint requirement in cars was arbitrary and capricious because NHTSA failed to present an adequate basis and explanation for its decision. *Id.* at 12. In that case, the court examined the series of proceedings that the agency held after the Department formally proposed a new standard for requiring seat belts. *Id.* at 13-14. In the proceedings, the agency amended the standard to require full passive protection for all front seat occupants. *Id.* at 14-15. Over the next several years, the agency published a progress report that affirmed the benefits of such safety systems. *Id.* at 18. However, a few years later, NHTSA reopened rulemaking and issued a final rule that rescinded the passive restraint requirement, maintaining that they no longer found that the automatic restraint requirement would produce significant safety benefits. *Id.* at 19. The court examined the logic behind NHTSA's recission of the passive restraint requirement and concluded that it was arbitrary and capricious agency action. *Id.* at 34. Notably, the court emphasized that NHTSA gave no consideration to modifying the standard to require the utilization of only airbag technology: "not one sentence of its rulemaking statement discusses the airbags-only option." *Id.* at 38.

Similarly, in *American Farm Bureau Federation,* the court concluded that EPA had failed to reasonably explain its decision to exclude certain studies while creating air quality standards

because it had previously accepted the importance of those studies. 559 F. 3d at 521. In that case, the court reviewed a challenge to EPA's regulation of an air pollutant under the Clean Air Act. *Id.* at 515. Plaintiffs claimed that EPA's decision to rely exclusively on studies of long-term exposure to air pollutants, instead of studies on short term pollutants, in creating the national air quality standards was arbitrary and capricious because it did not provide appropriate protection from short-term pollutant exposure. *Id.* at 520. The court agreed, noting that EPA had "failed adequately to explain why, in view of the risks posed by short-term exposures. . . its annual standard is sufficient 'to protect public health.'" *Id.* Specifically, the court pointed to the fact that EPA had cited to studies pointing to the health effects of short-term exposure in the past and did not explain why they suddenly found these studies not to be applicable anymore. *Id.* at 521. Ultimately, the court concluded that "it [was] not clear why the EPA no longer believes it useful to look as well to short-term studies in order to design the suite of standards" that would be most effective for reducing the risks associated with short-term exposure. *Id.* at 522.

In contrast, in *Center for Biological Diversity v. EPA*, the court held that EPA's decision to defer adopting a new national air quality standard until it could conduct further studies was not arbitrary and capricious because it was an area characterized by scientific and technological uncertainty. 749 F. 3d 1079, 1088 (D.C. Cir. 2014). In that case, petitioners argued that the Clean Air Act required EPA to issue a secondary standard that would provide protection against acid rain, while EPA argued that it would not be appropriate for them to issue one if they could not make a reasoned judgment to ensure that the standards were consistent with the Clean Air Act. *Id.* at 1087. Specifically, the court pointed to the reasons behind EPA's decision which included a lack of efficient measurement technologies and gaps in field measurement data. *Id.* at 1089. Ultimately, the court emphasized: "[i]n an area characterized by scientific and

technological uncertainty . . . this court must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." *Id.* at 1088 (quoting *Env't Def. Fund v. Costle*, 578 F.2d 337, 339 (D.C. Cir 1978)).

The court has interpreted the specific bounds of the statutory and regulatory scheme established by the Clean Water Act in a variety of cases. In *Sierra Club v. Meiburg*, plaintiff environmental groups sued EPA to force it to establish and implement pollution standards for waterways in Georgia. 296 F. 3d at 1023. After the district court ruled for a consent decree compelling EPA to develop implementation plans in Georgia, EPA appealed. *Id.* Sierra Club contended that unless implementation plans are read into TMDLs, the decree would be "reduced to 'empty formalism.'" *Id.* at 1031. In considering the merits of the consent decree, the appellate court considered the technicalities of the CWA, noting that: "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.'" *Id.* at 1025. Despite this, the court emphasized that the act "generally leaves regulation of non-point source discharges through the implementation of TMDLs to the states," including the planning the best management practices to reduce pollution. *Id.* at 1026. Therefore, the court concluded that despite inaction in the state of Georgia, the consent decree could not require EPA to develop implementation plans. *Id.* at 1032.

While the eleventh circuit emphasized that a consent decree could not require EPA to develop implementation plans for TMDL, the ninth circuit in *Pronsolino* articulated that TMDLs are important "informational tools" that are essential for EPA to identify waters requiring additional planning. 291 F. 3d at 1129. The court noted that TMDLs "serve as a link in an implementation chain . . . to the end of attaining water quality goals" that include the federally

regulated point source controls and state and local plans for point and nonpoint source reductions. *Id.* While the plaintiffs in this case pushed back against the inclusion of non-point sources in the TMDL, the court emphasized that TMDLs must be designed at a "level necessary to *implement* the applicable water standards." *Id.* at 1139. In other words, while TMDLs are not self-executing, and without proper inclusion of the non-point reduction practices, a TMDL will not be able to implement the applicable water standards in line with the CWA.

Further, the third circuit in *American Farm Bureau* held that in order for EPA to make a reasoned judgment under the APA, it was appropriate to require reasonable assurance from the states that the TMDL could be achieved. 792 F. 3d at 294. In that case, plaintiffs sued EPA, asserting that EPA exceeded its statutory authority while drafting the TMDL by requiring "reasonable assurance" from the states that they would fulfill the TMDL's objectives. *Id.* at 294. Specifically, plaintiffs asserted that Congress only authorized EPA to publish a TMDL at a "level necessary to implement the applicable water quality standards," therefore suggesting that a TMDL should be limited to the "level" necessary rather than extraneous frameworks such as reasonable assurance requirements. *Id.* at 297. However, the court disagreed, emphasizing that EPA was responsible for providing "sufficient information in connection with the TMDL for the public adequately to comment on the agency's judgment and to make suggestions where appropriate" in the notice-and-comment rulemaking. *Id*. at 298. More specifically, the court highlighted that "the EPA would fall afoul of this requirement if it published only a number with no supporting information, as the public would be unable to comment . . . without knowing whether or how the EPA thought such a level of discharged pollutant could be achieved." *Id.*

Here, EPA failed to account for the critical barriers impeding the success of the Lake Chesaplain TMDL in line with the goals of the CWA, namely the political pushback and lack of

compliance among agricultural sources to implement BMPs. The "relevant data" in the rulemaking record illustrates that the Lake Chesaplain TMDL cannot be accomplished without a commitment to reduction in non-point sources through BMPs. *See* Record at 8*; Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. In fact, the Chesaplain Commission's supplemental report in July 2016 shows a need for dire progress. Record at 8. The maximum loading for Lake Chesaplain was calculated at 120 metric tons annually, yet existing loads as of 2015 were calculated as totaling 180 metric tons. *Id.* Importantly, the largest source of pollution was found to be coming from non-point sources released from CAFO manure spreading, other agricultural sources, and septic tank inputs. *Id.* at 9. The report emphasized that the reduction in non-point sources can only be accomplished through the implementation of BMPs. *Id.* First, the hog CAFOs are contributing substantial phosphorus pollution despite their status as "non-discharging" CAFOs because a large portion of their manure spreading reached Lake Chesaplain through groundwater flows and surface runoff, despite compliance with nutrient management plans. *Id.* Second, private septic systems are contributing a significant amount of phosphorus pollution to Lake Chesaplain as well, even though these sources are exempt from the Clean Water Act permitting as discharges. *Id.* Due to these unique challenges, the rulemaking record specifically proposed to implement a TMDL that accomplished a reduction in pollution through an equally phased abatement in phosphorus discharges by both the point sources and non-point sources. *Id.* Moreover, these scientific conclusions "were not subject to substantive challenge." *Id.* However, as the rulemaking record notes, they were subject to political pressure. *Id.* at 10. Residential lakefront homeowners objected to the expensive septic tank maintenance and pumping that would be instituted by the BMP that required increased septic tank inspection and pumping schedules, and the Hog CAFOs objected to the possible imposition of BMPs, such as modified

feeds or physical and chemical treatment of manure streams, on their operations. *Id.* Due to this pressure, in July 2018, the DOFEC adopted the Hog CAFO's position and adopted a TMDL without any wasteload allocations or load allocations. *Id.*

EPA immediately saw that these positions were untenable if they were going to accomplish the goals of the CWA. *See id.* at 10. Therefore, EPA explicitly rejected the July 2018 DOFEC TMDL, pursuant to CWA § 303(d)(2), which did not require the imposition of BMPs to reduce non-point sources. *Id.* Instead, EPA adopted the original TMDL proposal specifically because it realized that the implementation of loading limits against non-point sources through BMPs was necessary to accomplish a reduction in pollution in the Chesaplain Watershed.

Yet, EPA explicitly "failed to consider an important aspect of the problem": the plan did not specify whether or how the proposed BMP measures would be enforced, even though the success of these programs is crucial to meet the goals of the TMDL and the record documents significant political pushback among the Hog CAFOs and home-owners. *See Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43; Record at 10. In this case, the problem is not, as it was in *Center for Biological Diversity,* "an area characterized by scientific and technological uncertainty" in which the courts "must proceed with particular caution." 749 F. 3d at 1088. Rather, here, as opposed to the need for efficient measurement technologies and field measurement data, EPA simply needs to ensure a way to enforce BMP mechanisms that have already been laid out against strong political will. *See id* at 1088.

Moreover, the agency did not "articulate a satisfactory explanation" for not requiring reasonable assurance that BMPs would be achieved. *See Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. As in *Motor Vehicle Manufacturers Ass'n,* where the court noted that an agency decision was arbitrary and capricious because "not one sentence of its rulemaking statement discusses" using

alternative airbag technology only to meet the safety requirements, here, EPA provides no explanation for why it did not consider how or whether the proposed BMP measures would be enforced. *See id.* at 38. Importantly, EPA did not consider the BMP enforcement even though, as the court in *American Farm Bureau Federation* emphasized, it had previously accepted the importance of the issue in the rulemaking record. *See* 559 F. 3d at 521. While *Sierra Club* notes that the courts cannot require EPA to develop implementation plans, TMDLs are important "informational tools" that are essential for EPA to "serve as a link in the implementation chain" to attain the goals of the CWA. 296 F. 3d at 1023; *Pronsolino,* 291 F. 3d at 1129. As the court emphasizes in *Pronsolino*, TMDLs must be designed at a "level necessary to *implement* the applicable water standards." 291 F. 3d at 1139. In this case, EPA adopted the original TMDL which depended on the regulation of non-point sources through BMPs that would simply not be enforced. In this sense, EPA designed an "informational tool" that does not accomplish a level necessary to coordinate the applicable water standards the CWA requires. *Pronsolino*, 291 F. 3d at 1139. Here, as the court in *American Farm Bureau Federation* emphasized, EPA cannot meet the arbitrary and capricious standard if it publishes a TMDL where "the public would be unable to comment . . . without knowing whether or how the EPA thought such a level of discharged pollutant could be achieved." 792 F. 3d at 298. Moreover, these concerns have materialized: 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 and Lake Chesaplain waters continue to violate water quality standards.

For these reasons, 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 due to the lack of assurance of BMP implementation.

CONCLUSION

Therefore, Appellant Chesaplain Lake Watch respectfully requests that this Court affirm the district court's grant of summary judgment regarding the TMDL's requirement for "daily" loads. Appellant further requests that this Court reverse the district court's grants of summary judgment regarding both EPA's inclusion of wasteload and load allocations in the TMDL and EPA's determination to include BMPs as an offset to point source reductions in the TMDL. Accordingly, Appellant requests remand for further proceedings consistent with these decisions.