TEAM 55

C.A. No. 20-000123

CONSOLIDATED WITH

C.A. No. 21-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellee-Appellant
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

No. 73-CV-2020 (RNR)

-and-

THE STATE OF NEW UNION

Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

No. 66-CV-2020 (RNR)

CONSOLIDATED CASES

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

In the *Clean Water Act* (CWA), Congress created a comprehensive framework to protect public health and welfare by monitoring and improving the nation's air quality. This case is about whether the Environmental Protection Agency (EPA) violated the CWA by:

(1) Interpreting the term Total Maximum Daily Load (TMDL) to include wasteload and load allocations.

(2) Allowing nonpoint pollution reduction to be achieved by implementing best management practices (BMPs) to make point source pollution reductions less stringent.

(3) Adopting a TMDL for the Lake Chesaplain Watershed that consists of an annual pollution loading reduction to be phased in over five years.

(4) Whether the EPA's BMP credit was arbitrary and capricious and an abuse of discretion.

Watersheds are dynamically balanced ecological systems that can be disturbed by human intervention and other external forces. When healthy, watersheds provide a wide array of benefits, ranging from "nutrient cycling, carbon storage, erosion/sediment control, increased biodiversity, soil formation, wildlife movement corridors, water storage, water filtration, flood control, food, timber and recreation, as well as reduced vulnerability to invasive species, the effects of climate change and other natural disasters." Benefits of Healthy Watersheds, EPA, https://www.epa.gov/hwp/benefits-healthy-watersheds (last visited Nov 21, 2021). Disturbed watersheds can be rehabbed by removing the external forces affecting the ecosystem's equilibrium, which allows the watershed to restore itself to its original conditions. Management of Riparian Areas, *in* Riparian areas: Functions and strategies for Management 301–303 (2002).

In 1972, the United States initiated the CWA to regulate the discharge of pollutants and the quality standards for surface waters across the United States. The CWA implemented a TMDL program that develops and implements the TMDL of a quantifiable pollutant that can comply with the standards (NRC 2001). Section 303(d) of the CWA and the US Environmental Protection Agency (USEPA) Water Quality Planning and Management Regulations (40 CFR Part 130) require states to develop TMDLs for water bodies that do not meet designated uses under technology-based pollution control.

The implementation of substantive TMDLs can massively improve the health of ecosystems and watersheds around the United States. However, the EPA and state actors have resisted applying the statute's plain meaning to TMDL plans, insisting that some loopholes and shortcuts exclude and give flexibility to pollution sources that do not fit into the CWA. If that position is allowed to stand, watersheds around the United States could be critically impaired, which would have far-reaching effects on climate change and human health across the world.

JURISDICTIONAL STATEMENT

Chesaplain Lake Watch (CLW) appeals from an Opinion and Order granting summary judgment in favor of New Union and against defendant EPA, granting partial summary judgment in favor of plaintiff CLW and against defendant EPA on the first cause of action, and granting partial summary judgment in favor of EPA and against CLW on the second cause of action, entered August 15, 2021, by the honorable Judge Remus in the United States District Court for the District of New Union, No. 66-CV-2020 and No. 73-CV-2020.

The district court had subject-matter jurisdiction because the action is reviewable pursuant to 5 U.S.C. § 704, and under 28 U.S.C § 1331 because the cause of action is provided

by federal law. CLW, New Union, and EPA all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. 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 S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

I. Did the District Court have jurisdiction over the challenges to Lake Chesaplain's TMDL, where plaintiffs argue the dispute is subject to the ripeness doctrine?

II. Did the EPA mistakenly require New Union to perform and submit wasteload allocations (WLAs) and load allocations (LAs) for phosphorus as part of a TMDL?

III. Did the EPA contradict the plain meaning and structure of the CWA by constructing "total maximum daily load" to allow for a phased percentage reduction in phosphorus loadings?

IV. Did the EPA consider the relevant factors and give a reasonable basis for its decision to develop wasteload allocation credits based on assumed nonpoint source BMPs?

STATEMENT OF THE CASE

A. The Clean Water Act

The actions before this court seek to apply the regulatory framework established by the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act (CWA). Record at 5. The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C §1251(a). The CWA established a comprehensive system for permitting and regulating point source discharges of pollutants U.S. Record at 5. Point sources are defined explicitly by statute; they generally include pollution discharge pipes and specifically include concentrated animal feeding operations (CAFOs) that discharge to waters. CWA § 502(14), 33 U.S.C. § 1362(14). Individual numerical permit limits for point sources are established for specific water pollutants based on industry-by-industry standards set by the EPA and are also based on standards designed to achieve desired water quality levels. Record at 5. Pollution coming from nonpoint sources, largely consisting of agricultural runoff and other unchanneled pollution, is not subject to direct regulation under the CWA permitting program. *Id.*

Water quality-based regulation of water pollution was the subject of the suits leading to this appeal and remains the subject matter before the court in this appeal. The CWA directs states to adopt water quality standards (WQS) for waters within their borders. 33 U.S.C. § 1313(a). Per statutory requirements, the WQS consists of the designated uses for each waterbody and the water quality criteria necessary to support the designated use. 33 U.S.C. § 1313(c)(2)(A). Water quality criteria can take several forms, including numerical limits on pollutant concentrations in the water body and narrative standards for aesthetic qualities and non-specific pollutants. See CWA § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b). States are required to

identify those water bodies that presently do not meet water quality standards and add them to a list of noted "impaired waters;" this list is updated by each state biannually. 40 C.F.R. § 130.7(d).

Once a water is listed as impaired, a state must develop a TMDL for the relevant pollutants for that water body "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Once a state has developed a TMDL, it must be submitted to the EPA. *Id.* By regulation, EPA defines a TMDL as "the sum of individual [WLAs] for point sources and [LAs] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). The applicable definition of a TMDL is one of the friction points that brought this suit before the courts.

The EPA definition of TMDL requires a state to establish the total maximum level of pollutant loading for a water body and allocate that level of loading among point sources in the watershed while taking into account the non-permitted nonpoint sources and natural background sources. Record at 6. This leads states to decide which discharges will have to be further reduced beyond existing permit limits and by how much. Id. It should be noted that a state may take credit for nonpoint source pollution reductions: "if Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i).

The EPA has the authority to approve or reject each step of the water quality standards process, including establishing a state's TMDLs for impaired waters. 33 U.S.C. § 1313(c)(3),

(d)(2). Relevant to the case at hand, when the EPA Administrator disapproves of a proposed TMDL, then they are directed to establish their own TMDL in its place. Record at 6.

B. Lake Chesaplain

The declining water quality in Lake Chesaplain has led to a series of regulatory actions by both the State of New Union Department of Fisheries and Environmental Control and the United States EPA. Record at 7. Lake Chesaplain had excellent water quality before the turn of the twenty-first century. *Id.* The lake's clean waters made Lake Chesaplain attractive to recreational boaters and fisheries around the region and supported the growth of vacation communities along its shores. *Id.* As the Lake Chesaplain watershed went through economic development, starting in the 1990s, the water quality began to decrease. *Id.*

Several factors were impacting the increased pollution of the watershed. During that decade, ten large-scale hog production CAFOs were built in the area. *Id*. A large-scale slaughterhouse was also made to service the production facilities. The recreational attractions at Lake Chesaplain also led to a boom in construction and an increase in sewage. *Id*. These external forces led to a noticeable dip in water quality during the twenty-first century's first decade. *Id*. The water fosters mats of algae that muddy the water and foul the air, the fish are dying, and the beaches are unsuitable for people to use. *Id*.

The growth and proliferation of CAFOs in the Lake Chesaplain watershed represent a significant risk to water quality because they massively increase the volume of waste and contaminants, such as antibiotics and other drugs used to manage livestock, and have a significant impact on the environment and public health. Impacts of waste from concentrated animal feeding operations on water quality, National Institute of Environmental Health Sciences,

https://ehp.niehs.nih.gov/doi/10.1289/ehp.8839 (last visited Nov 21, 2021). Livestock waste management practices do not do enough to address this problem or protect water sources from contamination. *Id*. In regions that CAFOs have impacted, the importance of using the CWA and TMDLs to protect water quality and minimize the runoff of toxins into water sources is more important than ever.

Healthy watersheds are an essential part of the toolbox for dealing with water treatment and preventing flooding. When healthy, watersheds are capable of filtering and storing more water and minimizing water treatment costs. The Economic Benefits of Protecting Healthy Watersheds (2012), EPA, https://www.fws.gov/daphne/shu/2012economic_benefits_factsheet2[1].pdf (last visited Nov 20, 2021). They protect against property damage and the high cost of clean-up to communities from floods and storm surges. *Id*. In short, a healthy watershed reduces the burden on public infrastructure, health, and safety.

The water quality of the Lake Chesaplain watershed is directly tied to the economic health and endurance of the New Union region. This water quality crisis is exacerbated because CWA permits do not regulate the CAFOs and second-home development sewage systems. The problems the Lake Chesaplain watershed faces require direct and forceful intervention to revive the ecosystem it protects.

C. Background of the Lake Chesaplain TMDL

A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for that particular pollutant. Overview of TMDLs, EPA, https://www.epa.gov/tmdl/overview-total-

maximum-daily-loads-tmdls (last visited Nov 20, 2021). A TMDL determines a pollutant reduction target and allocates load reductions necessary to the sources of the pollutant. *Id*. Pollutant sources are characterized as either point sources that receive a WLA or nonpoint sources that receive a LA. *Id*. According to the CWA, each state must develop TMDLs for all the waters identified on their Section 303(d) list of impaired waters, according to their priority ranking on that list. *Id*.

As a general matter, states are responsible for developing TMDLs and submitting them to EPA for approval. *Id*. Even if third parties assist in developing the TMDL or its supporting analysis, such TMDLs must still be submitted to EPA by the states. *Id*. Under the CWA, the EPA reviews and either approves or disapproves the TMDL. *Id*. If EPA disapproves a state TMDL, EPA must develop a replacement TMDL. *Id*.

The Chesaplain Commission issued a report in August 2012 which concluded that Lake Chesaplain was suffering from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. Record at 8. This algae growth is responsible for unseemly odors, decreased water clarity, and decreased dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. *Id.* The report deemed that this excess algae growth was caused by excessive amounts of the nutrient phosphorus in the water body and that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l throughout the lake. *Id.* An additional report from The Chesaplain Commission in July 2016 calculated the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard; this maximum loading was calculated at 120 metric tons (mt) annually. *Id.*

Initially, both New Union and the EPA failed to establish a TMDL for Lake Chesaplain despite being required by regulation. *Id.* In October 2017, the New Union Division of Fisheries and Environmental Control (DOFEC) publicly noticed a proposal to implement a Lake Chesaplain TMDL to reduce phosphorus discharges by point sources and nonpoint sources to be phased over five years. Record at 9. The proposed TMDL would have incorporated point source reductions through permit limits, while the nonpoint source reductions would be achieved through a series of BMP programs designed to encourage hog CAFOs and other agricultural sources. *Id.* Ultimately, DOFEC adopted a TMDL that consisted solely of a 120 mt annual maximum, without any WLAs or LAs. Record at 10. The EPA rejected this TMDL and adopted the original DOFEC TMDL proposal, consisting of a 35% reduction of annual phosphorus discharges by both point, and nonpoint sources phased over five years. *Id.* Since the EPA adopted the Lake Chesaplain TMDL, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed, and the waters continue to violate water quality standards. *Id.*

D. Proceedings Below

The case before the Twelfth Circuit arises from several consolidated actions, all commenced under Administrative Procedure Act §702, 5 U.S.C. §702. Record at 4, 10. The District Court determined that they had jurisdiction pursuant to 28 U.S.C. §1331. Record at 10.

Plaintiff New Union challenged the EPA's rejection of its proposed TMDL of 120 mt/year total loading for the Lake Chesaplain watershed. Record at 11. New Union argues that its submitted TMDL satisfied all the requirements for a valid TMDL under the CWA and that EPA's requirement that a state's TMDL submission include allocations between point, nonpoint, and natural sources is contrary to law. *Id.*

Plaintiff CLW brought two challenges against the EPA's adoption of the Chesaplain TMDL. *Id.* CLW argued that a TMDL consisting of an annual loading limit to be phased in over five years is contrary to the legal requirements of the CWA. *Id.* This is because a TMDL must be stated in terms of a daily load, not an annualized load, and the TMDL must be adequate to ensure the achievement of water quality standards on the date of its adoption, not five years later after a phased implementation. *Id.* CLW also challenged the WLAs and LAs adopted in the Chesaplain Watershed Implementation Plan (CWIP) TMDL. *Id.* Additionally, CLW argued that the EPA could not take credit for phosphorus LA reductions anticipated from implementing BMPs for nonpoint sources where the EPA has no authority to require implementation of these BMPs, since there is then no reasonable assurance the reductions will be achieved. *Id.*

The EPA disagreed with the merits of the claims of both plaintiffs and argued that its final Lake Chesaplain TMDL and CWIP were consistent with the requirements of the CWA and supported by scientific evidence. *Id.* EPA also contends that the court should dismiss both complaints as lacking ripeness since the Lake Chesaplain TMDL has no immediate regulatory effect and is dependent on later administrative actions. *Id.*

Several issues were brought to the District Court based on the above challenges. New Union sought a declaration from the District Court that EPA's rejection of its proposed TMDL, and the regulations governing TMDL submissions that the EPA based this rejection on, were invalid. Record at 5. CLW sought a declaration that the substantive provisions of the EPA Lake Chesaplain phosphorus TMDL were insufficiently protective and subject to being vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. *Id.*

The District Court denied the EPA's motion for summary judgment in part, granted CLW's motion for summary judgment in part, and granted New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL. *Id.*

SUMMARY OF THE ARGUMENT

The district court was correct in holding that the EPA's TMDL was ripe for judicial review, that the EPA's regulation requiring WLAs and LAs for phosphorus as part of a TMDL was lawful, and that a phased annual TMDL was not valid. The court was incorrect in finding the EPA's suggestion of nonpoint source BMPs to offset point source reductions as a matter of planning and not arbitrary, capricious, or an abuse of discretion.

The actions in this case were brought pursuant to the provisions of the Administrative Procedure Act, APA § 702. The ripeness doctrine requires that all necessary administrative actions related to the challenged agency action have been exhausted to allow the dispute to be subject to judicial evaluation. The U.S. Supreme Court has held that to determine whether a matter is ripe for review, the court must evaluate the fitness of the issues for judicial review and weigh the possibility of prejudice to the parties if the case is delayed pending further agency action. The district court had jurisdiction over the EPA's proposed TMDL because 28 U.S.C. § 1331 grants original jurisdiction to district courts for "all civil actions arising under the Constitution, laws, or treaties of the United States." The CWA is federal law, and both CLW and New Union have standing under Article III of the Constitution. Venue, which is waivable, was not objected to at the outset of this action, so the EPA waived objections to the venue, and the district court correctly heard the case.

The EPA argued that the court should dismiss all the claims in this case for lacking ripeness because the Lake Chesaplain TMDL will not have an immediate regulatory effect and depends on later administrative actions. Record at 12. However, the facts necessary to adjudicate these claims have been developed as part of the record before the EPA. *Id*. The district court correctly held that New Union and Chesaplain Lake Watch would be prejudiced if the validity of the EPA's Lake Chesaplain TMDL is not subject to judicial review. The TMDLs proposed here would require the State of New Union to start implementing National Pollutant Discharge Elimination System (NPDES) permit limits for point source discharges. *Id*. The Third Circuit Court of Appeals found a similar challenge to an EPA-issued TMDL ripe for review in *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015).

The EPA also argued that a TMDL requires WLAs and LAs, which is evident in the plain statutory meaning of a "Total Maximum Daily Load." The word "total" makes it clear that Congress intended both allocation types to be relevant in proposing a TMDL. In *Am. Farm Bureau Fed'n*, the Supreme Court affirmed the CWAs requirement that TMDLs consider nonpoint sources. The federal definition of a TMDL also shows the clear intent by Congress to include WLAs and LAs in the calculation of a TMDL. Since *Chevron* requires the court to analyze congressional intent when they have spoken on the matter, the EPAs reading of the word "total" in TMDL necessitating the inclusion of WLAs and LAs and rejecting the New Union Chesaplain Watershed TMDL was correct. *Chevron* at 837.

The proposed TMDL by the EPA to implement an annual pollution loading reduction phased over five years violates the requirement for a valid TMDL and goes against Congress's intended definition of a "Total Maximum Daily Load." Under the *Chevron* test, the word "daily" means "every day," making it clear that Congress intended the CWA to require specific daily

loads. The D.C. Circuit Court upheld the plain meaning of the word "daily" in 2006 when it held that the EPA could not approve seasonal or annual loads given the CWA's clear requirement for daily loads. *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006). The EPA argues that this strict interpretation of the term "daily" is too strict, but the EPA cannot avoid statutory requirements simply because it finds them difficult to manage.

Finally, the EPAs usage of BMPs in its proposed wasteload allocation TMDL was "arbitrary and capricious" and should not be upheld. The EPA's own internal guidance documents make it clear that there must be a "reasonable assurance" that the reductions proposed by implementing credit based on nonpoint source BMP pollutant loading reductions can be achieved. The court applies a highly deferential standard of review to the agency's decision, and the EPA only needs to show they considered the relevant factors and had a reasonable basis for their decision. The EPA has not been able to show that in this case.

One of the primary relevant factors in any plan for improving the water quality in a region is the political climate and economic pressures a region faces when implementing major water quality regulations. In this case, the State of New Union has never indicated that they would require the implementation of the proposed BMPs, and in the two years since the adoption of the TMDL, New Union has not made any effort to implement the contemplated BMPs. Record at 16. Though the CWA leaves the actual implementation and compliance by nonpoint sources optional for the states, the EPA must still follow its internal guidelines in making recommendations.

There is no indication that the EPA considered the political and economic pressures in New Union, and the proposed TMDL fails to address the relevant factors in managing the water quality of the Lake Chesaplain watershed. The EPA may not choose to promulgate TMDLs that

are beyond the realm of implementation simply for the sake of having submitted a proposal. There is no "reasonable assurance" that the TMDL can be implemented, and the EPA acted arbitrarily in approving BMPs in its proposed wasteload allocation TMDL.

This Court should hold that the matter was ripe for review, that the clear statutory language and history of the TMDL requires wasteload and load allocations and prohibits phased pollution reduction plans, and that the EPA acted in an "arbitrary and capricious" manner in approving BMPs despite evidence showing they were untenable.

STANDARD OF REVIEW

Ripeness is the doctrine that requires all necessary administrative actions concerning the challenged agency action to have been taken to allow the dispute to be subject to judicial evaluation. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). To determine ripeness, the court must evaluate the fitness of the issues for judicial review and the possibility of prejudice to the parties if judicial review is delayed pending further agency action. *Id*.

A district court's grant or denial of summary judgment is reviewed de novo. See, e.g., *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998); *Gasner v. Bd. of Supervisors of the City of Dinwiddie, Va.*, 103 F.3d 351, 356 (4th Cir. 1996); *Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994). Summary judgment is appropriate if the pleadings and discovery record reveal no genuine dispute concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

ARGUMENT

I. The Challenges to Lake Chesaplain's TMDL are fit for Adjudication and Require Immediate Judicial Review.

The EPA argues that the challenges to the Lake Chesaplain TMDL are not ripe for judicial review because the adoption of the TMDL will not have any impact on the parties until it has been incorporated into permits and other regulatory actions. Record at 12. This argument fails because all of the facts necessary to adjudicate the claims in this case have been developed and were part of the record before the EPA, and both New Union and Chesaplain Lake Watch will be prejudiced if the validity of the EPA's Lake Chesaplain TMDL is not subject to judicial review. *Id*.

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise." *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993). If a matter is unripe, the claim is subject to summary dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n. 9 (9th Cir. 200). A case is ripe for judicial review when all administrative remedies have been exhausted for the dispute subject to adjudication. *See Abbott Laboratories,* 387 U.S. at 149. The Supreme Court held that -- in a matter involving a ripeness determination -- the judiciary must first evaluate the fitness of the issues for judicial review, and second, the court must consider the possible prejudice to the parties if judicial review is delayed pending further action. *Id*.

The Supreme Court has identified three factors to consider when addressing ripeness in the context of a challenge to an administrative action: "(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).

In its challenge to the ripeness determination, the EPA relied on *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003), and *Bravos v. Green*, 306 F. Supp. 2d 48 (D. D.C. 2004), two cases where the courts determined that EPA approvals of state submitted TMDLs were not ripe for review. These cases do not support the TMDL in question, however, because this case involves specific permit limits for point sources, the State of New Union will need to implement right away. Record at 12.

In *Arcadia*, the TMDLs did not impose any obligations on the Plaintiffs, and the Plaintiffs were unable to show any way they would be harmed if the review was delayed. *Arcadia*, 265 F. Supp. 2d at 1157. They had "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Id* at 1157 (citing *Ohio Forestry Ass'n*, 523 U.S. at 734). Here, the State of New Union will need to implement the specific NPDES permit limits for point source discharges immediately, so they will be harmed if they cannot bring their legal challenge now.

In *Bravos*, the plaintiff challenged the EPA's alleged approval of a state's implementation plan, which did not satisfy the final agency action requirement. *Bravos*, 306 F. Supp. 2d at 48. The District of Columbia Circuit stated that "[t]he degree of finality of agency action is the key consideration in evaluating its 'fitness for judicial review' under the ripeness doctrine." *Id* at 55. There are two requirements for an agency action to be considered final, "[f]irst, the action must mark the 'consummation' of the agency's decision-making process, … it must not be of a merely tentative or interlocutory nature. And second, the action must be one by

which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow…” *Barrick Goldstrike Mines, Inc. v. Browner,* 215 F.3d 45, 48 (D.C. Cir. 2000).

The Court must “look primarily to whether the agency’s position is ‘definitive’ and whether it has a ‘direct and immediate … effect on the day-to-day business of the parties challenging the action.” *Bravos,* 306 F. Supp. 2d at 55. Unlike the plaintiff in *Bravos,* where the plaintiff challenged the procedure employed by the EPA to decide on the State’s TMDL, here, plaintiffs are challenging the actual approval of the TMDL, which does represent the EPA’s final action.

In *Am. Farm Bureau Fed'n,* the court found that the TMDL was ripe for review because of the investment in time, energy, and money required to develop and anticipate the imposition of the TMDL. *Am. Farm Bureau Fed'n,* 792 F.3d at 293. Here, the CWL, New Union, and the EPA all stand to spend considerable time and money developing and managing the response to the proposed TMDL if it is not reviewed now. As the Court of Appeals said in *Am. Farm Bureau Fed'n,* “if there is something wrong with the TMDL, it is better to know now than later.” *Id* at 293.

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Because all the facts necessary to adjudicate the claims in this case have been developed as part of the record before the EPA, and because New Union and Chesaplain Lake Watch would be prejudiced if the EPA’s TMDL is not judicially reviewed, the district court did not err in holding the EPA’s Lake Chesaplain TMDL ripe for judicial review. This court should affirm that holding.

II. Congressional Intent Leaves Little Room for Administrative Interpretation by the EPA Regarding the Definition of "Total Maximum Daily Load" in the Context of the Clean Water Act.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions: (1) Whether Congress has directly spoken to the precise question at issue, and (2) where the statute is silent or ambiguous with respect to the specific issue, whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A, Inc. v. NRDC, Inc*., 467 U.S. 837 (1984); also see *Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988). When analyzing statutory construction, the court must first attempt to discern congressional intent using "traditional tools of statutory construction." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (Case in which the Supreme Court considered both plain language and legislative history of an immigration policy to analyze congressional intent). If a court, in determining whether an agency's answer is based on a permissible construction of the statute, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Chevron*, 467 U.S. at 842, 843.

However, when Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to interpret the specific provision of the statute by setting their own regulations. *Id* at 843, 844. In such a case, it should be noted that a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Id* at 844. To determine the reasonableness of an agency's statutory construction, the court may look to both the agency's textual analysis and to the compatibility of that interpretation with the Congressional purposes behind the statute. *Cont'l Air*

Lines, Inc. v. Dep't of Transp., 843 F.2d 1444 (D.C. Cir. 1988). (Finding that traditional tools of statutory construction resulted in ambiguous conclusions regarding congressional intent, the court turned to the Department of Transportation's textual analysis of the statute and the compatibility of this interpretation with the Congressional purposes of the statute).

Several of the issues before the court concern the interpretation of "Total Maximum Daily Load," or TMDL, within the context of the CWA. While the CWA does not explicitly define TMDLs, it does provide that they "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). Though this language does not make congressional intent immediately clear, further analysis under the framework established in *Chevron* demonstrates that (1) EPA's rejection of the New Union Chesaplain Watershed TMDL was not contrary to law, because Congress intended to include both WLAs and LAs in a TMDL, and (2) The EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual reduction goes against the congressional intent that the word "daily" would be interpreted to literally mean "every day."

A. The EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that it failed to include wasteload allocations and load allocations was not contrary to law.

Applying the traditional tools of statutory construction to the definition of a TMDL in the context of the CWA makes it abundantly clear that Congress intended to include both WLAs and LAs in the calculations. As was established in *Chevron,* congressional intent is the law and must be given effect. *Chevron,* 467 U.S. at 842, 843. The court can discern congressional intent using

"traditional tools of statutory construction," including analyzing the plain language and the legislative history of the statute at issue. *INS,* 480 U.S. at 433, 436, 448. Both the plain language and the legislative history of TMDLs as provided in 33 U.S.C. §1313(d)(1)(C) reveals congressional intent to include WLAs and LAs into TMDL calculations.

In using the "traditional tools of statutory construction," the first consideration is the statute's plain language. *United States v. Dauray,* 215 F.3d 257 (2d Cir. 2000). However, in the case at hand, this can be simplified even further; the court should first consider the plain language meaning of a "Total Maximum Daily Load." The word which holds the most weight regarding the inclusion of wasteload allocations and load allocations is "total." The word "total" can exist in many forms; as an adjective, as a noun, as a verb, and even as an adverb. However, despite all of these different forms of "total," the definition is always the same; "comprising or constituting a whole," "absolute," "an entire quantity," and "a product of addition." Dictionary by Merriam Webster, *https://www.merriam-webster.com/dictionary/total* (last visited Nov 20, 2021). While this list of the definitions of "total" from the Merriam-Webster Dictionary is not exhaustive, it is clear that the word can be understood to mean the entirety of a thing. Therefore, the plain language of TMDL would clearly include both WLAs and LAs, and would imply that Congress intended both allocation types to be considered in the computation of a TMDL.

It is true that several courts have found that the CWA directive to establish TMDLs was ambiguous, and the term "total" was susceptible to multiple meanings. *Am. Farm Bureau Fed'n,* 792 F.3d at 298. These cases hold that "total" is not as straightforward as it appears at first glance and that TMDL factors such as seasonality and margins of safety make the use of the word "total" ambiguous. *Id.* Additionally, a noted source of ambiguity is that the CWA "assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states." *Id* at 299.

However, this argument for ambiguity is unconvincing because it does not overcome the use of the word "total" in TMDLs. This argument is made even stronger because although states are responsible for regulating nonpoint sources, "in drafting a TMDL the Clean Water Act unambiguously requires the author (here, the EPA) to take into account nonpoint sources." *Id.* This admission by the court in *Am. Farm Bureau Fed'n* directly rebuts their finding of ambiguity, as it reveals that a TMDL drafted by the EPA would be responsible for accounting for both WLAs from point sources and LAs from nonpoint sources. Additionally, even with ambiguity, the *Am. Farm Bureau Fed'n* court found that a regulation establishing a TMDL as the sum of WLAs from point sources and LAs for non-point sources was a reasonable interpretation of EPA's ability to establish a TMDL, which was a "highly complex and technical matter, and was consistent with overall goal of water pollution regulation." *Id* at 300.

The legislative history of TMDL also reveals congressional intent to include WLAs and LAs into TMDL calculations. This is because while 33 U.S.C.A. §1313(d)(1)(C) is silent on these allocations, they are clearly included as part of TMDL calculations under 40 C.F.R. §130.2(i). The definition of a TMDL within the Federal Regulations is "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background . . . [i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. §130.2(i). This federal definition shows clear intent to include both WLAs and LAs in the definition and calculation of a TMDL; the regulation even includes a provision to balance the two allocations against each other.

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The plain language interpretation of a TMDL, combined with the congressional intent made clear through federal regulations, demonstrates that Congress intended to include

wasteload allocations and load allocations into TMDL calculations. Since *Chevron* establishes that Congressional intent is akin to law, the EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that it failed to include wasteload allocations and load allocations was not contrary to law. This finding by the District Court should be upheld.

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

The EPA's adoption of a TMDL for the Lake Chesaplain Watershed raises the question of whether an annual pollution loading reduction to be phased over five years violates the requirements for a valid TMDL. Analysis shows that the EPA's TMDL does in fact violate these requirements, as it does not defer to Congress's intended definition of "total maximum daily load." In the same way in which the traditional tools of statutory construction demonstrate congressional intent to include both WLAs and LAs in the calculations of TMDL, they also clearly demonstrate that "daily" is intended to mean "every day." Once again, the court must look to the *Chevron* framework in order to analyze the congressional intent behind the use of "daily" in the context of a TMDL.

Whether the word is used as an adjective, noun, or adverb, "daily" is consistently defined as something occurring every day. Dictionary by Merriam Webster, *https://www.merriam-webster.com/dictionary/daily* (last visited Nov 20, 2021). There is no ambiguity anywhere within this definition. That Congress included the word "daily" in the term TMDL is a clear indication that they intended TMDLs to be applied by using the plain language meaning of the word. This plain-language interpretation of "daily" was upheld by the D.C. Circuit Court in 2006, where the

court found that the CWA unambiguously required the establishment of daily loads, and therefore EPA could not approve seasonal or annual loads. *Friends of Earth, Inc.,* 446 F.3d at 144. This court also noted that "a load expressed as a quantity per day is no different from a daily load, and we have never held that Congress must repeat itself or use extraneous words before we acknowledge its unambiguous intent." *Id;* also see *New York v. EPA*, 443 F.3d 880, 883 (D.C.Cir.2006).

It should be noted that in this decision, the D.C. court decided to ignore precedent set by the 2nd Circuit in 2001 where it was held that a TMDL for waterbody pollutants may be expressed by another measure of mass per time. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). The 2nd Circuit found this to be true on the grounds that the plain language meaning of "daily" was an overly narrow reading of the statute that lost sight of the overall structure and purpose of the CWA. *Id* at 98. This court also found that the plain language meaning of "daily" could result in statutory interpretation that produces absurd results. *Id* at 99*;* also see *Dauray,* 215 F.3d at 264 (A statute should be interpreted in a way that avoids absurd results). However, the D.C. Circuit Court found that the EPA could not avoid literal interpretation of the statutory term "daily" on grounds of absurdity because courts cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Friends of Earth, Inc.,* 446 F.3d at 145; also see *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002).

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The plain language interpretation of a TMDL, combined with the congressional intent made clear through federal regulations, demonstrates that Congress intended for "daily" to be interpreted literally as "every day." As *Chevron* establishes that Congressional intent is akin to law, 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 and the District Court's finding should be upheld.

III. EPA's Consideration of BMP's in Wasteload Allocation Credit Program Was "Arbitrary and Capricious" Because of Known Political Opposition to Implementation

The EPA argues that the agency considered all relevant factors and gave a reasonable basis for its decision to approve the validity of wasteload allocation credits based on assumed nonpoint source BMPs. This argument fails because it is unreasonable to plan and give advice based on standards and programs that have no chance of actual implementation. Political opposition to the implementation of the BMPs prompted New Union to abandon attempts to include BMPs in their own watershed implementation plan, and in two years since the adoption of the TMDL, New Union has taken no action to execute the BMPs suggested in the CWIP. Record at 16.

The Court applies the highly deferential "arbitrary and capricious" standard of review to evaluate claims involving an agency applying its own regulatory standard to the record before the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shahala*, 34 F.3d 1161, 1167 (2d Cir. 1994). Simply stated, this standard requires the Court to consider whether an agency considered all the relevant factors and gave a reasonable basis for its decision. The operative phrase in this argument is the term 'reasonable basis.'

There is simply nothing in the record that shows the EPA had a reasonable basis for considering BMPs in their wasteload allocation credit program for the TMDL. Though the District Court rejected the argument by CLW that in order to take credit for nonpoint source BMP pollutant loading reductions there must be a "reasonable assurance" that the reductions will be achieved, the EPA's internal documents show that it should still be a key factor in making

such a determination. EPA, Guidance for Water Quality Based Decisions: The TMDL Process (1991). https://www.epa.gov/sites/default/files/2018-10/documents/guidance-water-tmdl-process.pdf. According to the EPA, "the record should show that in the case of any credit for future nonpoint source reductions... there is reasonable assurance that nonpoint source controls will be implemented and maintained." *Id*. In this case, the EPA did not follow its own guidelines for whether a crediting program for nonpoint source reductions should be approved.

Nothing in the record indicated that the State of New Union had any intentions to ever implement BMPs suggested by the CWIP. In fact, New Union, in suggesting an alternative watershed implementation plan, limited its efforts to establishing a total loading and avoided any attempt to require BMPs or allocate the loading among sources. Record at 16.

Since the adoption of the TMDL two years ago, New Union has not taken any action to implement the BMPs from the CWIP. *Id*. The lack of engagement over several years with the BMPs as a measure to manage nonpoint sources of pollution demonstrates the incapability of these measures in ensuring compliance with the CWA and maintaining healthy watershed ecosystems.

The district court held that the CWA § 303 TMDL program is a planning and information program and that nothing in the CWA requires actual implementation and compliance by nonpoint sources. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *City of Arcadia*, 265 F. Supp. 2d at 1142. Though the program is not an implementation program, its planning and information should still be grounded in reality, as noted above by the internal EPA document related to the TMDL process.

The EPA's TMDL provides New Union with information about possible BMPs that could be used to comply with water quality standards. Still, it is arbitrary of the agency to

suggest initiatives when they don't have a reasonable assurance that they could be implemented. In this case, the EPA had a reasonable assurance to the contrary, that the BMPs did not stand a chance of implementation.

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Because the EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions in the course of planning for water quality standard compliance was based on factors they knew there was no reasonable assurance of implementation for, because the EPA has not made a convincing argument that they considered all these relevant factors and because the EPA can not articulate a reasonable basis for its decision to provide New Union with a TMDL that is destined to fail, the district court erred in holding that the EPA's suggestion to include nonpoint source BMPs to offset point source reductions was not arbitrary and capricious or an abuse of discretion. This court should reverse that holding.

CONCLUSION

Upon the foregoing, Appellant CLW respectfully requests that this Court affirm the district court's grant of summary judgment for New Lake Union, affirm the district court's grant of partial summary judgment for appellant CLW on the first cause of action, and reverse the district court's grant of partial summary judgment for EPA on the second cause of action, and remand for further proceedings consistent with that decision.