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, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

This case comes before the Court on the issue of the EPA's creation of a TMDL for Lake Chesaplain. The Lake is currently in violation of its water quality standards. The State of New Union created a TMDL that was unsatisfactory to the EPA and therefore the EPA created a new TMDL for the Lake to allow for the successful decrease in pollutant which would bring the Lake's water quality back to its required levels. On appeal the Court of Appeals ruled that the EPA's TMDL and implementation plan were ripe for review, the EPA's interpretation of "total maximum daily load" was incorrect and therefore their rejection of New Union Chesaplain Watershed phosphorus TMDL was contrary 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 EPA's BMP credit was arbitrary and capricious and an abuse of discretion.

The EPA appeals the all 4 rulings of the Lower Court and ask this Court to dismiss this case for lack of ripeness, or remand.

JURISDICTIONAL STATEMENT

The EPA, Chesaplain Lake Watch, and the State of New Union each from an order and judgement granting partial summary judgment for defendant EPA and plaintiffs New Union and Chesaplain Lake Watch, entered August 15, 2020, by the honorable Judge Remus in the United States District Court for the District of New Union, consolidated cases 66-CV-2020 and 73-CV-2020. The district court had jurisdiction under 28 U.S.C. § 1331 because the cause of action is provided by federal law. Specifically, this case was brought pursuant to Administrative Procedure Act § 702, 5 U.S.C. § 702. EPA, Chesaplain Lake Watch, and New Union 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

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

2) Whether EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

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

4) Whether EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

STATEMENT OF THE CASE

Lake Chesapalin has had declining water quality recently. Lake Chesaplain is designated as Class AA, which is the classification reserved for highest quality waters of the state. The designated uses include drinking water source, primary contact recreation (swimming), and fish propagation and survival. In an attempt to mitigate these water quality uses, the State of New Union submitted a TMDL to the EPA that consisted solely of a 120 mt annual maximum, without any wasteload allocations or load allocations. Pursuant to CWA § 303(d)(2), EPA rejected the July 2018 TMDL, and, in May 2019, after notice and comment, adopted the original DOFEC TMDL proposal, consisting of a 35% reduction of annual phosphorus discharges by both point and nonpoint sources phased in over five years, to be implemented through permit controls on point sources and BMP requirements for nonpoint sources. The original DOFEC TMDL proposal was based off of a report called "The Chesaplain Supplemental Report" which was created by the Lake Chesaplain Study Commission in 2008. The Report came out with these scientific conclusions. First, the Commission determined that Lake Chesaplain was suffering from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. Besides being aesthetically displeasing, this algae growth was also responsible for objectionable odors, decreased water clarity, and a decrease in dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. Summertime DO levels were found to be three milligrams per litre (mg/l), well below the five mg/l DO standard designated for class AA waters in the State of New Union. This excess algae growth, in turn, was caused by excessive amounts of the nutrient phosphorus in the water body. The commission determined that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l throughout the lake. Measured phosphorus levels in the lake

varied from 0.020 to 0.034 mg/l, well above the desired level. In addition to the DO violations, the Chesaplain Commission also identified violations of the state's water quality standards for odor and water clarity. These findings are what led to the original TMDL, and are the reasons the EPA declined the second TMDL that New Union proposed.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's holding that struck down the EPA's adoption of EPA's adoption of a TMDL in the form of a phased annual limit. The EPA should be afforded Chevron deference in its interpretation of Section 303(d) of the Clean Water Act. Section 303(d) does not explicitly require a TMDL to be expressed in per day metrics, rather the provision requires the EPA to consider how to effectively implement a TMDL in service of water quality improvements. Section 303(d) also notes that the EPA should consider variations and uncertainties when promulgating a TMDL. The Second and Third Circuits have held that EPA's construction of TMDLs in annual terms constitute permissible constructions of Section 303(d). Both Circuits assert that TMDLs using annual metrics are due Chevron deference because of the ambiguity of Section 303(d), and the authority of the EPA to consider complex variables and effectuate the purpose of the Clean Water Act to achieve water quality standards. This Court should adopt that position.

This Court should reject the District Court's determination that a phased annual reduction within the EPA's TMDL amounts to an impermissible extension beyond the 1977 deadline set for the EPA's initial identification and permitting under the Clean Water Act. The TMDL provisions of the Clean Water Act are by definition remedial and must be applicable to bodies of water that are found to be out of compliance with water quality standards beyond the 1977 deadline. TMDLs and associated implementation plans are not themselves subject to the 1977 deadline, while the deadline applies more directly to permits and control measures. However, the Clean Water Act requires constant regulation and agency planning, even though the original statutory deadline has elapsed. Applying the 1977 deadline to new regulations and actions under the Clean Water Act would produce absurd results, particularly for provisions that are designed

to be remedial. This Court should reject such a statutory interpretation of the 1977 deadline because the results would be absurd, normalize noncompliance with water quality standards, and authorize challenges to decades of permitting and planning done by the EPA to effectuate the purpose of the Clean Water Act.

This Court should affirm the District Court's decision to review and uphold the EPA's application of BMP offset credits toward the TMDL under the "arbitrary and capricious" standard. An agency that acts with a reasonable basis after consideration of relevant factors in the administrative record to apply its regulations to an action authorized under a statute should be given substantial deference. During promulgation of the TMDL, the EPA considered the optional enforcement, potential reductions, and constituent concerns related to BMP implementation and associated pollutant reductions. The TMDL is a planning and objective-setting regulation, and BMP reductions are a projection and provision of information to the state, not a mandate to implement specific control measures. The BMP offsets are offered in accordance with EPA regulations, but if they do not produce reductions, the state will have to implement other control measures to meet the TMDL. Further, the reductions associated with BMPs calculated in the TMDL are similar to actual reductions shown in studies done for the EPA on the effectiveness of BMPs in reducing phosphorus load. The Court should therefore affirm the EPA's inclusion of BMP reductions in the TMDL.

STANDARD OF REVIEW

Subject-matter jurisdiction is a matter of law, which is reviewed de novo. Rajasekaran v. Hazuda, 815 F.3d 1095, 1098 (8th Cir. 2016). A district court's grant or denial of summary judgment is also 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).

ARGUMENT

I. None of the challenges to the Lake Chesaplain TMDL are ripe for judicial review, because the TMDL has not been incorporated into specific permits or other regulatory actions.

None of the challenges to the Lake Chesaplain TMDL are ripe for review because all necessary administrative actions giving the challenged agency action concrete effect have not been taken. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). Since the TMDL permits have not been distributed and the full record is not before the EPA, not all necessary administrative actions have been taken to give the TMDL concrete effect. Therefore, there are no possible prejudices to the parties even if judicial review is delayed pending further agency action as no party will suffer any effects of the TMDL until modifications of NPDES permits or New Union implementation of BMP requirements occur. Ripeness should remain a large hurdle to cross to maintain the efficiency and effectiveness of agency action.

A. Not all facts necessary to adjudicate the claims in this case have been developed and are part of the record before EPA, therefore this case is not ripe for adjudication.

The lower Court was incorrect when it ruled that all facts necessary to adjudicate the claims in this case have been developed and are part of the record of the EPA. Though the TMDL contemplates specific NPDES permit limits for the point sources discharges, which the State of New Union will be required to implement, without delay, none of these concrete actions have taken place. There are even facts, which the lower Court acknowledged are not on the record before the EPA. "The NPDES permit for the slaughterhouse expired in November 2018 and has not yet been reissued. The NPDES permit for the Chesaplain Mills sewage treatment plant likewise expired in February 2019. Both plants continue to operate under their expired permits as administratively extended based on their timely applications for permit renewal. See 40 C.F.R. § 122.6. As such, neither plant is currently subject to any limit on phosphorus discharges. DOFEC has proposed to modify each permit to reflect the 35% annual phosphorus

loading reduction phased in over five years after permit issuance, but both facilities have sought administrative hearings on this proposed requirement based on the cost of compliance. Since EPA's adoption of the Lake Chesaplain TMDL, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed. The state-issued nutrient management permits for the hog CAFOs have not been modified to incorporate any phosphorus reduction measures contemplated by the CWIP. Lake Chesaplain waters continue to violate water quality standards." *Chesaplain Lake Watch, et. all v. U.S. Environmental Protection Agency*, C.A. No. 21-000123, 10, (2021). Since the record before the EPA is incomplete, as these facts are clearly important to the effects of the TMDL, the lower Court errored in ruling that the record was complete. The plants have not even finished their administrative hearings with the EPA. Since ripeness requires that "all necessary administrative actions giving the challenged agency action concrete effect must have been taken." this case is not ripe for judicial review. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).

Since the issues in this case are not purely legal, and are going to developed by further factual findings, such as the administrative hearings of the plants, this case is not ripe for judicial review. *Cf. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 201 (1983). For example, the CWIP has yet to specify whether or how the proposed BMP measures would be enforced. The enforcement of the CWIP is a major factor in giving the TMDL concrete effect, and since it has not been decided, the TMDL has no full concrete effect. The Lower Court errored in finding this case was ripe for judicial review.

B. There is no possible prejudice to the parties if judicial review is delayed pending further agency action

No party will suffer any possible prejudice even if judicial review is delayed "The hardship of the parties of withholding court consideration must inform any analysis of ripeness." *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 581, 105 S. Ct. 3325, 3333 (1985). The plaintiffs in this case are not able to point to any actual prejudice they will suffer if this case is not adjudicated pending further EPA action. The only current repercussions of the in this case, as of right now, is that Lake Chesaplain waters continue to violate water quality standards. This is a repercussion what was happening and will continue to happen until the TMDL actual takes concrete effect.

It is possible for prejudice to occur to a party before an action takes concrete effect, such as the prejudice that was present in Abbott. In that case "the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 154, 87 S. Ct. 1507, 1518 (1967). This case differs from Abbott because the plaintiffs do not stand to suffer any of these repercussions. In fact, the players who do stand to suffer these types of repercussions are the plants who are separately attempting to change the TMDL through administrative hearings with the EPA. Therefore this case is still not ripe for review as the plaintiffs will suffer no possible prejudice if judicial review is delayed pending further agency actions.

C. Allowing Courts to prematurely adjudicate Agency Actions would degrade the efficiency and purpose of Agency Action

"Ripeness' basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The TMDL for Lake Chesaplain is a complex matter, and the reasoning and action

behind the TMDL has been considered carefully by the EPA to ensure the water quality of the Lake is brought back into the required numbers. It is true that those who must curb their waste and those who enjoy the lakes waters and want the water quality to be brought back up to higher standards and the EPA may not all agree on the best way to achieve this goal. That is why this complex issue is not ready for adjudication, all those parties interested have not been allowed to have their interests and objections on the record before the EPA, such as the plant who are just not attempting to object to the TMDL through administrative hearings. Allowing Courts to jump in to adjudicate Agency Actions before they are allowed to run their full course of actions would significantly detract from the effectiveness and efficiency of Agencies as a whole. The EPA needs to be able to focus on the administrative hearings and develop a full record to be able to create rulings and things like TMDLs that result in the best possible outcome for all parties. The only way they are able to do this is through administrative hearings and reviews from all interested parties, and if the Court steps in before these actions have been fully fleshed out, they are chopping the Agency off at the knees before allowing these processes to fully function. Ripeness must remain a large hurtle to achieve for Agencies to maintain their purpose and function as congress intended.

II. Congress has not directly spoken to the interpretation of "total maximum daily load" and EPA's maximum daily load total interpretation is correct and permissible.

The lower Court errored in its interpretation of the two steps of *Chevron* to determine if the EPAs interpretation of "total maximum daily load" is permissible. *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). First, the Court must determine whether Congress has spoken directly to the interpretation in question, based on the statutory language, legislative history, and structure. If so, then Congress's intended interpretation must prevail over a contrary

interpretation by the administering agency. *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 842-843 (1984). Second, if the meaning of the statute is unclear, or Congressional intent is otherwise ambiguous, the Court must inquire whether the agency's interpretation is a permissible one. Id.

A. Congress has not spoken directly to the interpretation of "total".

In the lower Courts own analysis it is clear that congress has not spoken directly to the interpretation of the word "total" as it functions in CWA §303(d). "The word "total" in "total maximum daily load" does not admit of a construction that would require the total to include a specification of proposed (not existing) components of the total. The context of section 303(d) likewise supports the construction that Congress meant total when it said total." *Chesaplain Lake Watch, et. all v. U.S. Environmental Protection Agency*, C.A. No. 21-000123, 13 (2021). This argument is circular in that simply by identifying the word "total" in section 303(d) it must mean that only "total" was meant. However, this does not make any sense as there is no actual definition of the word total in this section of CWA 303. This means that Congress has never spoken directly to the interpretation of the word total as it applies in this context, meaning that the word total is still not clearly defined. The lower Court further evidences this by then looking at other sections of the CWA to evidence why total doesn't meant total in the way the EPA used it. however, if congress had spoken directly to the interpretation of total in CWA § 303(d) then the use of other sections to clarify 303(d) would be unnecessary. This indicates that the meaning of total in 303(d) is not clear and therefore the second step of *Chevron* must be addressed.

B. EPA's action was permissible under *Chevron* deference because it was a reasonable interpretation of the statute.

The use of "total", by the EPA, as the total contribution from both WLAs and LAs allocating the proposed total phosphorus loading among individual point sources and nonpoint sources is permissible because it is a reasonable interpretation of CWA 303(d). "Agency action is

permissible if it represents a "reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts."" *Nio v. United States Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 64 (D.D.C. 2017) citing; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513, 517-18, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (upholding application of a broad regulation because it did not conflict with the regulation's plain language). *See also Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218, 129 S. Ct. 1498, 173 L. Ed. 2d 369 (2009). This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). When interpreting ambiguous statutory language "involves difficult policy choices," deference is especially appropriate because "agencies are better equipped to make [these choices] than courts." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* , 545 U.S. 967, 980, 125 S. Ct. 2688, 2698 (2005).

Even with this deference the interpretation must still be reasonable. Agency action this is not backed by a reasoned explanation is not reasonable. *see Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA* , 846 F.3d 492, 521 (2d Cir. 2017). An action that is unreasonable would exist, for example, "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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983). Using total in this way does not violate any of these listed reasons for an

action to be unreasonable. For these reasons the EPA's action was permissible because their interpretation of the word total was reasonable.

III. EPA's adoption of a TMDL in the form of a phased annual limit should be afforded Chevron deference and accords with the requirements and purpose of Section 303(d) of the Clean Water Act.

A. EPA is owed deference under the Chevron doctrine to interpret and enforce Section 303(d) of the Clean Water Act by issuing TMDLs using variable time measurements designed to effectively achieve water quality standards and reflect seasonal variation and uncertainty.

The District Court improperly applied the Chevron test and determined that EPA's promulgation of a phased annual TMDL for Lake Chesaplain is not permissible under section 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d); Chevron, U.S.A, Inc. v. NRDC, Inc., 467 U.S. 837 (1984). Finding that the term "total maximum daily load" (emphasis added) precludes a TMDL measured in annual terms, the District Court struck down the TMDL for Lake Chesaplain as contrary to the plain meaning of Section 303(d). This application of Chevron fails to consider the purpose of the Clean Water Act, does not consider the full text of Section 303(d), and inappropriately constrains the EPA's discretion to implement the law.

Under the Clean Water Act, states are required to ascertain which bodies of water within the state fail to meet water quality standards despite active operation of pollutant limitations under 33 U.S.C. §§ 1311(b)(1)(A), (B). States must establish a TMDL for relevant pollutant inflows into such noncompliant waters. 33 U.S.C. § 1313(d)(1)(D). If a state fails to appropriately establish a TMDL, the EPA may promulgate one instead. 33 U.S.C. § 1313(c)(3), (d)(2). In the case before this Court, the EPA rejected New Union's 2019 TMDL for Lake Chesaplain and issued the Chesaplain Watershed Implementation Plan ("CWIP"). The CWIP included a TMDL of 120 metric tons of phosphorus inflow to be phased down from 180 metric tons over a five year period.

Chesaplain Lake Watch argues that the EPA's TMDL, measured in metric tons per year, is not an authorized interpretation of Section 303(d) because the term TMDL itself requires expression in daily measurements. This argument fails to consider the discretion EPA has when interpreting the Clean Water Act, a law it is charged with enforcing. Where Congress has failed to unambiguously address a question of statutory meaning, the agency responsible for enacting a provision has latitude to apply a reasonable interpretation of that provision. 467 U.S. 837. Under Chevron, courts must defer to an agency's construction of the statute, so long as that construction is not arbitrary, capricious, or contrary to law. Id.

In this case, Congress has not unambiguously set forth in the required metrics used to measure and establish a TMDL. Section 303(d) reads: "Such [TMDLs] 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). Not only does this statutory language fail to specify a requirement for daily measurement of pollutant discharges, it includes extensive language authorizing the EPA to take into account multiple variables and uncertainties. Id. The statute explicitly prioritizes effective implementation of TMDLs and plainly recognizes the uncertainties and variations that EPA must consider when effectuating a TMDL. Id.

The District Court asserted that the inclusion of the term "daily" within TMDL is sufficient to establish that the statute requires TMDLs to be set forth in a units per day format. This reasoning mirrors the holding by the D.C. Circuit in Friends of Earth, Inc. v. EPA, which found that Congress's intent in naming TMDLs with the term "daily" was an unambiguous instruction to set TMDLs as a unit per day limit. Friends of Earth, Inc. v. EPA 446 F.3d 140, 144

(D.C. Cir. 2006). In that case, the Court struck down a TMDL set by the District of Columbia for the Anacostia River expressed in annual terms. Id. That court relied on the dictionary definition of daily and cited to Bible verses to find that daily means "per day" and that the statute clearly required TMDLs to be expressed in per day terms. Id. However, the court refused to seriously consider the full text of the relevant section, which requires the EPA to set TMDLs that can be effectively implemented and that should contemplate multiple variables. Id.

Both the Second and Third Circuits have issued rulings on similar arguments over TMDLs. In American Farm Bureau Federation v. EPA, the Third Circuit found that a TMDL expressed in annual terms is a permissible construction of Section 303(d), and that the EPA is owed deference in promulgating TMDLs expressed in time metrics other than daily limits. American Farm Bureau Federation v. EPA, 792 F.3d 281, 297 (3d. Cir. 2015). That court noted that many courts have defined TMDLs by reference to the EPA's implementing regulations, which allow the agency to use variable time periods to measure TMDLs. Id.; 40 CFR § 130.2(i). Recognizing the complexity involved in enforcing the Clean Water Act, that court also noted that the EPA is positioned to leverage its expertise and practical considerations in setting TMDLs. Id. The court acknowledged the "considerable gaps" in the Clean Water Act's specifications for setting TMDLs. Id. Chevron deference is especially important to agencies implementing a statutory scheme "requiring technical or scientific sophistication" and granted that the Clean Water Act is such a statutory scheme. Id.

The Second Circuit made a similar decision in NRDC v. Muszynski. 268 F.3d 91, 98–99 (2d Cir. 2001). Asserting that the primary purpose of the Clean Water Act, and specifically Section 303(d), is to effectively regulate water pollution, the court held that the EPA has substantial discretion to implement TMDLs measured in variable time scales. Id. The EPA's

consideration of seasonal variation, unique features of certain waters, and dynamic pollutant sources and interactions are all necessary to enforce meaningful regulations that will achieve statutorily required water quality standards. Like the case before this court, the Second Circuit's holding involved a TMDL for phosphorus. Id. Phosphorus pollution tends to involve substantial seasonal variations and complex accumulation dynamics. Id. The Second Circuit recognized these complexities, and affirmed the EPA's authority to deal with those complexities by setting TMDLs with flexible timescale metrics. Id. That court also emphasized the specific statutory language in Section 303(d) that obliges the EPA to set TMDLs that account for seasonal variation. Id. Setting a single daily limit for phosphorus pollution would seriously impede the EPA's ability to meet that obligation. Id.

This court should align with the Second and Third Circuits and affirm the EPA's authority under Section 303(d) to set TMDLs using an annual metric. The Clean Water Act generally, and Section 303(d) specifically, not only defines TMDL, it also delegates authority to the EPA to achieve water quality standards by employing the agency's expertise to factor in multiple variables to promulgate practical and effective regulations. A simple example illustrates the power and necessity of this delegation. Imagine a pollutant concentration has exceeded applicable standards in a lake. That pollutant flows into the lake from multiple sources. Many of those sources are not controlled by a spigot or produced at a regular daily interval by a business or municipal waste system. The pollutant is used as an input in agriculture, but only in the spring. The summer climate around this lake is very dry, and it rarely rains. In the fall, heavy rainstorms are common and flush the pollutant from agricultural fields into the lake, mostly during ten large storms. Each storm flushes 100 units of pollutant into the lake During the rest of the year, a small chemical plant also discharges a small amount of the same pollutant from its wastewater system,

but at a level well below permitting requirements. The chemical plant discharge occurs every day, and its daily outflow is three units of pollutant. Both the chemical plant and the agricultural fields send about 1000 units of pollutant into the lake each year. However, the steady discharge of phosphorus by the chemical plant results in higher average pollutant concentrations in the lake, while the phosphorus loads from the rainfall events is largely temporary, as the higher flow draining from the lake carries much of the agricultural pollutant flow out of the lake.

Now imagine that the EPA sets a TMDL of five units per day to reduce the pollutant inflow from about 2000 units per year to just over 1800 units per year. The chemical plant can then increase its pollutant outflow by one or two units per day during much of the year. The TMDL would only be exceeded during fall rainstorms, even though the chemical plant has a proportionately worse impact on average pollutant levels in the lake. The lake would likely face a higher pollutant level year round as the chemical plant increases its discharge, and either the farmers' use of the pollutant would be restricted or the lake's pollutant levels would grow even further out of compliance. If the EPA instead issues an annual TMDL of 1800, and requires limits and reductions in both the discharge from the chemical plant and use of the pollutant in agriculture, then the problems caused by seasonal variation and unpredictability can be more effectively addressed and remedied.

The dilemma illustrated in the simplified example above indicate exactly why Section 303(d) requires the EPA to consider seasonal variation and to promulgate TMDLs that are tailored to achieve improved water quality, and not strictly limited to setting daily pollutant discharges. The Second and Third Circuits have both articulated that the EPA is owed deference by courts regarding implementation of Section 303(d) because the statute prioritizes effective regulation and requires consideration of variables and uncertainties. By contrast, the D.C. Circuit

in Friends of Earth and the District Court in this case employed a simplistic and impractical interpretation of EPA's authority based on a single word. While this approach is attractive because it skirts complex analysis of the text of Section 303(d) beyond the name of a TMDL alone, it does not serve Congressional intent nor the effective enforcement of the Clean Water Act by the EPA.

B. The EPA's use of a phased annual reduction in its TMDL is not an extension for achievement of water quality standards that violates the 1977 deadline set by Section 301(b) of the Clean Water Act.

Chesaplain Lake Watch and the District Court assert that the adoption of a TMDL that operates with a phased annual reduction in the phosphorus load limit from 180 metric tons to 120 metric tons over 5 years is an impermissible extension of the 1977 deadline for achievement of water quality standards, as set forth in Section 301(b) of the Clean Water Act.

This court must reject this argument simply because it is absurdly impractical and undercuts an enormous portion of the EPA's work to achieve water quality standards from 1977 to the present. Further, the District Court's ruling relies on only two cases to support this concept of an impermissible extension. Neither of these two cases provide a familiar fact pattern or cognizable logic to support the District Court's holding.

The TMDL program itself serves a remedial purpose. States and the EPA are required to identify bodies of water that do not meet applicable water quality standards and establish TMDLs to bring those waters into compliance. By the District Court's logic, any regulation short of halting all industrial and agricultural activity, stopping the rain, and demanding that a body of water be brought into immediate compliance with standards set by 1977 would constitute an impermissible extension of the statutory deadline. Any new permits, new standards, new pollutants, new climate conditions, new industries would be rendered incomprehensible under

the District Court's framework. That view accepts that all water quality metrics were set and met by 1977, and any deviation demands nothing less than a regulation requiring immediate compliance at all costs. This approach is virtually impossible to implement and would make noncompliance with the Clean Water Act the status quo. Referring to a long-passed deadline is not an effective way to improve water quality. Setting forward-looking limits and regulating toward practical and achievable reductions serves the purpose of the Clean Water Act and the public interest. The reality is that Clean Water Act is an active law and its implementation requires ongoing regulatory activity by states and the EPA to achieve and maintain the law's purposes.

The District Court cites a ruling by the U.S. District Court in D.C., in which that court actually refused to set a deadline on the establishment of a TMDL. NRDC v. EPA, 301 F. Supp. 3d 133 (D.D.C. 2018). In that case, phased annual reductions in a TMDL plan were not considered. Id. The D.C. District Court did consider whether and when a state's ongoing failure to establish a TMDL triggered the EPA's responsibility to act instead of the state and establish a TMDL itself. Id. That court noted that the EPA and states were slowly cooperating to establish a state-issued TMDL. Id. Following a two-year delay, the court considered whether to force the EPA to issue a TMDL absent state input, and the court decided not to do so. Id. In the instant case, the EPA has already acted to implement a TMDL following New Union's failure to produce an adequate plan.

Also cited by the District Court, Bethlehem Steel Corp. v. Train is a Third Circuit decision from 1976 that refused to allow the EPA to issue a point source discharge permit after the 1977 deadline set forth in the Federal Water Pollution Control Act (FWCPA) (now a consolidated part of the Clean Water Act). Bethlehem Steel Corp. v. Train, 544 F.2d 657, 661

(3d Cir. 1976). The FWPCA was passed in 1972 and directed the EPA to identify and issue permits for all applicable point sources before 1977. Id. The EPA began the permitting process prior to the deadline, and Bethlehem Steel asked the court to approve an extension so that the permit could be issued after 1977. Id. Still months prior to the 1977 deadline, the Third Circuit found the deadline clear and unambiguous, and required the EPA to issue the permit prior to the deadline. Id. The result of the Third Circuit's ruling was intuitive and practical. The EPA was required to issue the permit within a few months and had the capacity to do so.

The applicability of the statutory deadline in a case considered months prior to the 1977 deadline is clearly distinguishable from the instant case, which contemplates remedial actions taken decades after a statutory deadline. Bethlehem Steel Corp. v. Train is also distinguishable from the instant case because it targeted a point source permit, to which the 1977 deadline applied directly. Id. In this case, the District Court claims that the 1977 deadline applies because point source permits can be issued to implement a remedial TMDL plan. The 1977 deadline would be more applicable to a permit issued pursuant to the TMDL plan, but if successful, such a challenge could be brought against any permits issued under the Clean Water Act after 1977. 33 U.S.C. § 1311(b)(1)(C). Such a result would be patently absurd and would undermine the enforceability and practical implementation of the Clean Water Act.

On multiple occasions the Supreme Court has expressed a principle that avoids the absurd application of statutory deadlines that passed long ago: "courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results." Helvering v. Hammel, 311 U.S. 504 (1941). Deciding that a plan for phased reductions in pollutant discharges to bring a body of water into compliance with the Clean Water Act in 2021 must be scrapped to fit a 1977

deadline is such an absurd result. The District Court failed to cite applicable precedents in its ruling because none exist. Effective implementation of the Clean Water Act requires the EPA to constantly set and manage new limits and issue new permits, and this Court should not allow the use a 1977 deadline as an obstacle to forward-looking application of the Clean Water Act.

IV. The EPA's allocation of credits against the TMDL for the implementation of BMPs is not arbitrary and capricious because it rests on a reasonable basis and consideration of relevant factors.

Section 303 of the Clean Water Act authorizes the EPA to plan, provide information, and implement water quality plans, including TMDLs. 33 U.S.C. § 1313. The EPA has promulgated regulations that implement the Clean Water Act's requirements for identifying noncompliant waters, establishing TMDLs, planning to meet TMDL limits, and achieving water quality standards. Specifically, under 40 CFR § 130.2(i), the EPA defines TMDL and notes that "[BMPs] or other controls other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs." 40 CFR § 130.2(i). To determine the load allocations designed to meet the TMDL and CWIP, the EPA applies this regulation to the record establishing the TMDL. The District Court recognized that the EPA had a reasonable basis for its inclusion of reductions from BMPs based on consideration of relevant factors in the administrative record raised during the notice and comment period of the TMDL promulgation.

In the case before bar, the EPA's CWIP measures for satisfying the Lake Chesaplain TMDL and achieving water quality standards incorporates the use of BMPs to produce 35% reductions in phosphorus load from nonpoint sources. Lake Chesaplain watch challenged this provision as having no connection to the administrative record on which the TMDL and CWIP was based. The District Court appropriately noted that concerns about the application of BMPs

to reduce phosphorus from nonpoint sources, particularly CAFO hog farms, was considered in the notice and comment period for the promulgation of the TMDL and CWIP. The District Court also correctly points out that TMDL is promulgated to inform pollution control measures such as point source permits and nonpoint source BMPs. Idaho Conservation League v. Thomas, 91 F.3d 1345, 1347 (9th Cir. 1996). TMDLs are not direct enforcement mechanisms themselves, and courts have recognized that TMDLs are generated as objectives that are taken into account when issuing more direct control measures. City of Arcadia v. EPA, 265 F.Supp.2d 1142, 1145 (N.D. Cal. 2003). Unlike point source permits, which are required by the Clean Air Act and must consider relevant TMDLs, BMPs are optional control measures that states are given the option to implement. Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002).

In assessing Chesaplain Lake Watch's claim that the inclusion of BMPs to reduce nonpoint source phosphorus loads, the District Court appropriately applied the test laid out in Overton Park v. Volpe, which requires an agency to take action with a reasonable basis after consideration of the relevant factors. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); City of New York v. Shalala, 34 F.3d 1161, 1167 (2d Cir. 1994). The Supreme Court in that case considered the circumstances under which an agency action could be overturned for being "arbitrary and capricious" and therefore prohibited by Section 706 of the Administrative Procedure Act. 5 U.S.C. § 706. So long as an agency's decision has a reasonable basis and followed consideration of the relevant factors in the administrative record, the Supreme Court held that agency action was owed substantial deference and should not be overturned by the courts. 401 U.S. at 416; 34 F.3d at 1167. This court should apply that same reasoning and uphold the EPA's inclusion of offsets from BMPs in the TMDL and CWIP.

During both New Union's rejected attempts to promulgate a TMDL and EPA's promulgation of a TMDL, concerns about the enforceability of BMPs for nonpoint sources were raised and included in the administrative record. Reductions from BMPs were included in the TMDL and CWIP an in accordance with EPA regulations that specifically provide that reductions from nonpoint sources from BMPs can offset reductions from point sources. Upon progress toward the TMDL, BMPs will either be implemented and their reductions measured and credited toward the TMDL, or the state will not implement BMPs and be required to meet the TMDL through other methods, like point source permitting. Nevertheless, the EPA's plan to reduce phosphorus loads from nonpoint sources by 35 percent through implementation of BMPs has a reasonable basis. Studies conducted for the EPA to track phosphorus reductions show that BMPs can result in reductions of phosphorus loads from nonpoint sources by 32 percent.1 These studies show that the EPA's plan for achieving the TMDL has a reasonable basis in studies of actual reductions produced by implementing BMPs.

In conclusion, this Court should affirm the District Court's holding that the EPA's inclusion of reductions from BMPs was not arbitrary and capricious because it has a reasonable basis and was informed by consideration of relevant factors in the administrative record. The use of BMP offsets is provided for in EPA regulations, and the EPA applied those regulations appropriately in formulating the TMDL for Lake Chesaplain. The fact that New Union has not

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[1] *See* Bracmort, K., B. Engel, and J. Frankenberger. 2004. Evaluation of structural best management practices 20 years after installation: Black Creek watershed, Indiana. J. Soil Water Cons. 59(5): 191-196.; Bracmort, K. S., M. Arabi, J. R. Frankenberger, B. A. Engel, and J. G. Arnold. 2006. Modeling long-term water quality impact of structural BMPs. Trans. ASABE 49(2): 367−374.; Donald W. Meals, Steven A. Dressing, John Kosco, and Susan A. Lanberg. 2014. Land use and BMP tracking for NPS watershed projects. Tech Notes 11, June 2014. Developed for U.S. Environmental Protection Agency by Tetra Tech, Inc., Fairfax, VA, 31 p. Available online at https://www.epa. gov/polluted-runoff-nonpoint-source-pollution/nonpoint-source-monitoringtechnical-notes.

implemented BMPs simply means that the state will have to resort to other enforcement mechanisms to achieve reductions that meet the TMDL and CWIP.

CONCLUSION

In Conclusions we ask that the Court dismiss this case for lack of ripeness or to reverse the ruling of the lower Court and remand the case for further adjudication.