Team #35

C.A. No. 21-000123

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The present case involves the declining water quality of Lake Chesaplain, located in the State of New Union, and the regulatory response measures taken by the State and the United States Environmental Protection Agency ("EPA" or "Agency"). In the District Court for the District of New Union, Plaintiffs Chesaplain Lake Watch ("CLW") and the State of New Union ("New Union") brought suit against EPA, challenging the Agency's rejection of New Union's proposed total maximum daily load ("TMDL") plan for phosphorous loadings in the Lake Chesaplain watershed and promulgation of its own TMDL pursuant to the Clean Water Act, § 303(d). *See* 33 U.S.C. § 1313(d) (West 2000). In this appeal, EPA seeks reversal of the district court's decision granting partial summary judgment for Plaintiffs on various issues discussed in the sections below.

JURISDICTIONAL STATEMENT

The District Court for the District of New Union had jurisdiction to review the case pursuant to 28 U.S.C. § 1331 (West 1980), concerning federal question jurisdiction, and 5 U.S.C. § 702 (West 1976), which provides that, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The United States Court of Appeals for the Twelfth Circuit has jurisdiction to review the district court's decision pursuant to 28 U.S.C. § 1291 (West 1982), which provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." A timely notice of appeal was filed by all parties seeking review under this Court's jurisdiction pursuant to section 509(b) of the Clean Water Act. *See* 33 U.S.C. § 1369(b)(1) (West 2018).

STATEMENT OF ISSUES PRESENTED

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

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

III. Does 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 violate the CWA § 303(d) requirements for a valid TMDL?

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

STATEMENT OF THE CASE

I. The Clean Water Act

The Clean Water Act ("CWA") is a comprehensive system of permitting and regulation for point source discharges of pollutants into the waters of the United States. R. at 5. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (West 1987), and address the serious threats that water pollution poses to public health, economic activity, and the long-term viability of the Nation's water resources. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 298-99 (3d Cir. 2015);

Upper Blackstone Water Pollution Abatement Dist. v. EPA, 690 F.3d 9, 13-14 (1st Cir. 2012). To achieve these goals, the CWA requires states to adopt water quality standards ("WQS") for submission to and approval from the EPA Administrator, which shall include designated uses for each waterbody and the water criteria that is necessary to support the designated use. *See* 33 U.S.C. §§ 1313(a)(1), (c)(2)(A).

After establishing its WQS, the state is required to regularly assess the ability of each water body to meet such standards, modifying and adopting the water quality criteria as appropriate. *See id.* § 1313(c)(1). For those waters within the state's boundaries that are insufficiently regulated under the current effluent limitations, the states shall identify those waterbodies, account for the severity of the pollution, and disclose the uses of such waters. *Id.* § 1313(d)(1)(a). The state must then develop a total maximum daily load for the offending pollutants that are suitable for calculation. *See id.* § 1313(d)(1)(c). EPA defines a TMDL as "the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). The TMDL 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." *See* 33 U.S.C. § 1313(d)(1)(c).

The Act further requires federal, state, and local agencies to work cooperatively and develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources. *See* 33 U.S.C. § 1251(g); *see also* Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 Envt'l & Energy L. & Pol'y J. 63 (2011) ("Cooperative federalism generates checks and balances that boost efficiency and success…"). Under the principle of cooperative federalism, states are

expected to implement both the permitting and water quality improvement aspects provided under the Clean Water Act, subject to federal intervention. *See id.* If a state fails to do so, EPA may administer these programs and promulgate its own standards pursuant to section 303 of the Clean Water Act. *See* 33 U.S.C. § 1313(c)(3).

II. Factual Background

Lake Chesaplain is a fifty-five mile-long, five-mile-wide natural lake located within the State of New Union. R. at 7. The Union River flows into Lake Chesaplain at the north end of the lake, where the City of Chesaplain Mills is located. *Id*. Prior to the turn of the twenty-first century, Lake Chesaplain's clear waters supported vacation communities and attracted recreational boaters and fishers. *Id*. Beginning in the 1990s, however, the Lake's water quality started to decline following the construction of ten large-scale hog production facilities, known as concentrated animal feeding operations ("CAFOs") along the Union River watershed and a large-scale slaughterhouse in Chesaplain Mills to service these CAFOs. *Id*. Other residential developments, including second home construction, also contributed to Lake Chesaplain's declining water quality. *Id*.

The slaughterhouse obtained a CWA National Pollutant Discharge Elimination System ("NPDES") permit, issued by the State of New Union, that allowed the slaughterhouse to discharge its pollutants directly into the Union River. *Id*. Although the hog CAFOs were exempt from EPA permitting requirements because they were considered "non-discharging," the State of New Union regulated the CAFOs through a statute providing for New Union Agricultural Commission review and approval of site-specific nutrient management plans for the application of liquid manure waste to fields. *Id*.

Additionally, the publicly owned sewage treatment plan ("STP") from Chesaplain Mills that discharged directly into Lake Chesaplain was regulated by a CWA point source permit. *Id*. However, the septic systems that serviced the second home construction on Lake Chesaplain's shores were not subject to CWA permits. *Id*. As a result, Lake Chesaplain's water quality declined as increased algae growth reduced the clarity of the water and created offensive odors, causing a decline in vacation home property values, tourism revenue, and fish productivity. *Id*.

In response, New Union created the Lake Chesaplain Study Commission (the "Chesaplain Commission"), which issued a 2012 Report (the "2012 Chesaplain Report") detailing the excessive algae growth, scientifically known as eutrophication, that was causing biological decline in the Lake. R. at 8. The Report explained that excessive amounts of the nutrient phosphorus were causing the excess algae growth and, as a result, produced objectionable odors, decreased water clarity, and a decrease in dissolved oxygen levels needed for a healthy fishery. *Id*. The Report further concluded that the current phosphorous levels in the Lake varied between 0.020 to 0.034 mg/l, which far exceeded the desired maximum phosphorus levels of 0.014 mg/l. *Id*.

In 2014, the New Union Division of Fisheries and Environmental Control ("DOFEC") submitted to EPA its § 303(d) impaired waters list, including Lake Chesaplain as a waterbody with insufficient water quality standards. *Id*. DOFEC did not, however, submit a TMDL for Lake Chesaplain in its list of impaired waters. Despite this failure, EPA approved DOFEC's § 303(d) submission. *Id*.

In July 2016, the Chesaplain Commission issued a Supplemental Report calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard and identifying the existing sources of phosphorus inputs. *Id*. The Chesaplain Supplemental

Report determined that the hog CAFOs and private septic systems contributed substantial phosphorus loadings to the Lake Chesaplain watershed through groundwater flows and surface runoff, despite both the CAFOs and septic systems holding CWA exemptions and complying with CWA management plans. R. at 9. Furthermore, neither of the point sources in the Chesaplain Watershed had permit limits for phosphorus, as no such limits are provided for in the relevant technology-based effluent limitations guidelines issued by EPA. *Id*.

In October 2017, DOFEC drafted a proposal to implement the TMDL through a 5-year phased reduction in phosphorus discharges by both point sources and nonpoint sources with the ultimate goal of reducing phosphorous discharges by 35%. *Id*. Point source reductions would be incorporated as permit limits and nonpoint source reductions would be achieved through a series of BMP programs designed to encourage the hog CAFOs and other agricultural sources. *Id*. Proposed BMPs for the hog CAFOs included modified feeds for animal production facilities aimed at reducing phosphorus in manure, physical and chemical treatment of manure streams, and restrictions on manure spreading for frozen or saturated soil. *Id*. Proposed BMPs for private septic systems consisted of increased septic tank inspection and pumping schedules. *Id*. In response to several objections to the originally proposed TMDL, DOFEC adopted a TMDL consisting of a 120 mt annual phosphorous loading maximum, without any wasteload allocations or load allocations, and submitted its revised TMDL to the EPA Administrator for approval. *Id*.

In May 2019, after notice and comment, EPA rejected the revised TMDL and adopted the Chesaplain Watershed Implementation Plan ("CWIP"), which included DOFEC's original proposal to implement a TMDL consisting of a 5-year phased 35% reduction of annual phosphorus discharges for point and nonpoint sources. R. at 10. The CWIP included permit

controls for point sources and BMP requirements for nonpoint sources but did not specify whether or how the proposed BMP measures would be enforced. *Id*.

III. Procedural History

On January 14, 2020, the State of New Union filed suit against EPA, seeking declaratory judgment that the Agency's rejection of the New Union's proposed TMDL plan and the proposed regulations was invalid. R. at 5. In response to EPA's adoption of the CWIP, Plaintiff Chesaplain Lake Watch filed a separate suit on February 15, 2020, seeking a declaration that EPA's phosphorous TMDL were insufficiently protective and should be vacated under the Administrative Procedure Act as contrary to law, arbitrary and capricious, and unsupported by the record. The District Court for the District of New Union granted unopposed motions to consolidate both actions on March 22, 2020.

Cross-motions for summary judgment were fully briefed, and the district court ultimately granted Plaintiff CLW's motion in part, granted Plaintiff New Union's motion to vacate EPA's rejection of the State's proposed phosphorus TMDL, and denied in part EPA's motion for summary judgment. The district court also held that both CLW and New Union had standing under Article III.

STANDARD OF REVIEW

The appellate courts review a grant of summary judgment *de novo*, considering all the evidence and the inferences it may yield in the light most favorable to the nonmoving party. *See Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005). The court of appeals views all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Pierce v. Dep't of U.S. Air Force*, 512 F.3d 184, 186 (5th Cir. 2007). Summary judgment is proper when the evidence reflects no genuine issues of material fact, and

the non-movant is entitled to judgment as a matter of law. *See Pierce*, 512 F.3d at 186 (internal quotations omitted). Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. *See Ellis*, 432 F.3d at 1325-26 (internal quotations omitted). For factual issues to be considered genuine, they must have a real basis in the record. *See id.* (internal quotations omitted).

Courts will affirm a summary judgment on any ground supported by the record, even if it is different from that relied on by the district court. *See Pierce*, 512 F.3d at 186; *Lozano v. Ocwen Fed. Bank, FSB*, 489 F.3d 636, 641 (5th Cir. 2007). If there is no genuine issue of material fact, then the reviewing court must determine if the district court correctly applied the law. *See Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003); *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995).

SUMMARY OF THE ARGUMENT

The district court correctly held that EPA's adoption of credit of nonpoint source pollution reduction BMPs to offset point source loadings was not arbitrary and capricious or an abuse of discretion, despite the lack of reasonable assurance of the BMP implementation. However, the district court erred in failing to dismiss the Plaintiffs' unripe claims. Additionally, the district court erred in concluding that EPA's TMDL definition requiring wasteload allocations and load allocations contradicts the plain meaning and purpose of the CWA § 303(d) and that the regulation 40 C.F.R. § 130.2(i) is contrary to law under *Chevron* step one. Furthermore, the district court erred in concluding that EPA's interpretation of the phrase "total maximum daily loads" contradicts the plain meaning of the CWA and finding that an annual pollutant loading limit is inconsistent with the purpose of the statute.

First, the district court erred in failing to dismiss New Union and CLW's motions because their claims are unripe. Unripe claims may be dismissed for lack of subject matter jurisdiction. *Ass'n of Am. Med. Colleges v. U.S.,* 217 F.3d 770, 773 (9th Cir. 2000). Ripeness requires all necessary administrative actions to be taken that would give the challenged agency action concrete effect. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148–49 (1967). A ripeness determination requires a court to balance "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* None of the claims here are ripe for judicial review because they did not meet "final agency action" and were still subject to further agency review. *See* 5 U.S.C. § 704 (West 1966). Thus, Plaintiffs' should have been dismissed.

Second, the district court erred in granting CLW's motion for summary judgment challenging EPA's definition of the phrase TMDL to require waste load allocations and load allocations. The Agency's definition was a permissible interpretation of the statute and, thus, its decision was entitled to deference under the *Chevron* framework. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). "Congress granted broad regulatory authority to EPA" and the EPA Administrator "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §§ 1251(a), (d); *Am. Farm Bureau*, 792 F.3d at 297. Doing so not only permits, but "*requires* the drafter of a TMDL to consider nonpoint-source pollution" since it would be "impossible to meet those standards by point-source reductions alone." *Am. Farm Bureau*, 792 F.3d at 298.

The district court also erred in concluding that EPA's interpretation of the phrase "total maximum daily loads" to include an annual pollutant loading limit is inconsistent with the purpose of the statute and contradicts the plain meaning of the CWA. EPA's TMDL measuring

pollution loads at an annual percentage reduction is entitled to deference because the Agency is authorized to measure nonpoint and point source pollution loads at rate that best serves the purpose of effective regulation of pollutant levels in waterbodies. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001). When examining the statutory language, the content of the phrase "total maximum daily load" in § 303(d) of the Clean Water Act is ambiguous and, thus, the Agency's interpretation is entitled to deference under *Chevron*. *See Am. Farm Bureau*, 792 F.3d at 295; *Chevron*, 467 U.S. at 844. Therefore, the court should defer to the Agency's interpretation because Congress delegated broad authority to EPA to create rules carrying the force of law, and the Chesaplain Lake TMDL was promulgated in the exercise of that authority. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Finally, the district court properly concluded that EPA's suggestion to offer credits for nonpoint source BMPs as a method of offsetting point source reductions was not arbitrary and capricious because EPA is not required to provide a "reasonable assurance" that pollutant loading reductions will be achieved through the nonpoint source BMPs. *See Am. Farm Bureau*, 792 F.3d at 300, 307. Even if this court determines that the Clean Water Act does require EPA to include reasonable assurances in its proposed TMDL for Lake Chesaplain, the Agency's decision to offset point source pollutant loading reductions with nonpoint source BMPs is not arbitrary and capricious because the determination was reasonably based on relevant factors, including but not limited to the substantial contribution of phosphorus loadings into the Lake Chesaplain watershed created by the hog CAFOs and other nonpoint sources. *See Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C. Cir. 1981). Therefore, because EPA's interpretation of a Clean Water Act provision is not unreasonable or unsupported by relevant factors, the court should

affirm the district court's decision and defer to the Agency's reasonable exercise of authority. *See Citizens Coal Council v. EPA*, 447 F.3d 879, 895-97 (6th Cir. 2006); *Costle*, 657 F.2d at 323.

ARGUMENT

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

The district court erred in failing to dismiss New Union and CLW's motions since they are unripe. Unripe claims may be dismissed for lack of subject matter jurisdiction. *Ass'n of Am. Med. Colleges,* 217 F.3d at 773. A ripeness determination requires a court to consider: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. More specifically, in an administrative action, a court may consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 734 (1998).

First, delayed review would not cause minimal hardship to the plaintiffs. Here, the TMDL is subject to revision and depends on further administrative action. *See* R. at 10. The TMDL does not have any impact on the parties unless and until it is incorporated into specific permits or other regulatory actions. R. at 12. Second, judicial intervention would likely interfere with further administrative action sought out by New Union. *See* R. at 10. The slaughterhouse and sewage treatment plant facilities have sought administrative hearings after DOFEC proposed to modify each permit to reflect BMP requirements. *See id*. Thus, because the TMDL depends on the outcome of these further administrative actions, judicial intervention is not appropriate. *See id*. Finally, the Court would benefit from further factual development of the issues. Important details, like enforcement of the proposed BMP measures, need to be established before

the Court is able to decide the case. The Plaintiffs' claims should be dismissed because their claims are unripe for judicial review.

Additionally, the Plaintiffs' claims should be dismissed because EPA's phosphorous TMDL did not constitute "final agency action." APA § 704 requires that the Court may only review a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To be final, agency action must meet two conditions. "First, the action must mark the 'consummation' of the agency's decision-making process" and "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). In determining whether agency action is final for purposes of judicial review, 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. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986).

Because the slaughterhouse and the sewage treatment plant facilities have sought administrative review and the action is still subject to review, EPA's phosphorous TMDL did not "mark the 'consummation' of the agency's decision-making process." *See id.* Furthermore, the action is not one in which "legal consequences will flow" and did not create a "direct and immediate…effect on the day-to-day-business" of the Plaintiffs. *See id*. Here, since EPA's adoption of the Lake Chesaplain TMDL, New Union has not taken any steps to require phosphorous reduction BMP by nonpoint sources in the Lake Chesaplain Watershed, and the hog CAFO's permits have not been modified to incorporate any phosphorus reduction measures as

required by the CWIP. R. at 10. It is clear that this is not final agency action and thus, the Plaintiffs' claims should be dismissed. *See* R. at 10.

II. EPA correctly rejected the New Union Chesaplain Watershed phosphorous TMDL on the grounds that the TMDL failed to include wasteload allocations and load allocations, contrary to CWA § 303(d).

The district court erred in granting CLW's motion for summary judgment that challenged EPA's definition of the phrase TMDL to require waste load allocations and load allocations because the Agency's definition was a permissible interpretation of the statute and thus, EPA is entitled to deference under the *Chevron* framework. *See Chevron*, 467 U.S. at 844. Utilizing *Chevron* framework, because Congress did not explicitly define the contents of a TMDL in the CWA, and because the Act is "ambiguous" on this issue, EPA's rejection of the TMDL is a *permissible* interpretation of the statute and its decision is entitled to deference. *See id*. ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme…, and the principle of deference to administrative interpretations.").

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court found that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *Id*. at 843. First, if Congress has directly spoken about the matter and the intent of Congress is clear, then that is the end of the inquiry. *Id*. However, if Congress "has not directly addressed the precise question at issue" and "the statute is silent or ambiguous" on the specific issue, then the court must inquire "whether the agency's answer is based on a *permissible* construction of the statute." *See id*. (emphasis added). Courts are equipped with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, but where the canons of statutory interpretation and resort to other interpretive aids fail to resolve the ambiguity, the federal courts give deference to the interpretation of the agency tasked with administering the statute. *See Muszynski*, 268 F.3d at 98; *see e.g.*, *Mead*

Corp., 533 U.S. at 227-28 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."). If the plain meaning is susceptible to multiple reasonable meanings, courts turn to the canons of statutory construction and consider the entire statute in all its part, subsequent statutory amendments, and any internal inconsistencies. *See United States v. Dauray*, 215 F.3d 257, 262-64 (2d Cir. 2000).

For instance, in applying the *Chevron* analysis, the Court of Appeals for the District of Columbia in *American Farm Bureau Federation* held in favor in EPA, determining that the lack of "congressional silence" on how to define "total maximum daily load" authorizes EPA to require load and waste load allocations. *See Am. Farm Bureau*, 792 F.3d at 300. The court found that although the statute does not necessitate EPA to do so, EPA does have the authority to do so. *See id.* Here, because the CWA does not directly address whether a TMDL should include wasteload allocations or load allocations and is ambiguous on this issue, the Court should inquire as to whether the agency's action is "based on a *permissible* construction of the statute" and, after careful examination of the records, the Court will find that it is. *See Chevron*, 467 U.S. at 843 (emphasis added).

"Congress granted broad regulatory authority to the EPA," and that "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA]…shall administer this chapter." 33 U.S.C. § 1251(d); *see also Am. Farm Bureau*, 792 F.3d at 297. Although Congress directed EPA to establish total maximum daily loads, it did not prescribe *how* EPA should do so. *Am. Farm Bureau*, 792 F.3d at 298. EPA's interpretation of TMDL "falls within the gap" and is a "permissible construction of the statute." *See id*. Thus, EPA is entitled to deference. *See id*. at 306.

Moreover, including wasteload and load allocations is not only a permissible construction of the statute but a necessary one. *See id*. at 299. The CWA "requires the drafter of a TMDL to consider nonpoint-source pollution," and it is "impossible to meet those standards by point-source reductions alone." *See id*. Additionally, the "congressional silence on how to promulgate a TMDL" and the "congressional demand that a TMDL be established only for waters that cannot be cleaned by point-source limitations alone" necessarily implies that the TMDL must incorporate nonpoint source limitations, which authorizes EPA to express load and waste load allocations. *Id*. This supports the overall purpose of the Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). EPA's decision to require wasteload and load allocations is entitled to deference because the CWA is silent and ambiguous on this issue and EPA's interpretation is permissible under the statute.

III. EPA's adoption of TMDL measuring pollution loads at an annual rate to be phased in over five years does not violate the requirements for a valid TMDL under Section 303(d) of the Clean Water Act.

On the issue of EPA's promulgation of a phosphorous TMDL measuring point source pollutant loads at an annual rate, the district court erred in granting partial summary judgment for CLW because the Agency's interpretation of the phrase "total maximum daily load" in section 303(d) of the CWA is entitled to deference due to ambiguity found in the statutory language. *See Am. Farm Bureau*, 792 F.3d at 295 (holding that an agency's efforts to "faithfully [fill] the gap that Congress created" in the statute will be afforded great deference); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1133-35 (9th Cir. 2002) (finding EPA's interpretation of section 303 must be afforded substantial deference because Congress entrusted EPA with discretion and EPA has specialized experience regarding the CWA which the court lacked).

Section 303(d) of the Clean Water Act requires states to establish total maximum daily loads for those pollutants suitable for such calculation "*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) (emphasis added). When enacting the Clean Water Act, Congress delegated broad regulatory authority to EPA, charging that, "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] ... shall administer this chapter." 33 U.S.C. § 1251(d); *see Am. Farm Bureau*, 792 F.3d at 295.

The circuit courts are split on whether the phrase "total maximum daily load" is an unambiguous expression of congressional intent. *See e.g.*, *Muszynski*, 268 F.3d at 103 (holding that a "total maximum daily load" may be expressed by another measure of mass per time); *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (holding that the Clean Water Act unambiguously required establishment of *daily* loads). However, when examining the statutory language, the statute itself is silent on whether another timeframe may be used when that would be more appropriate for the particular pollutant at issue. *See Am. Farm Bureau*, 792 F.3d at 296.

A. Because the phrase "total maximum daily load" is inherently ambiguous, the district court erroneously limited TMDL reductions to its plain meaning and failed to consider other canons of interpretation as required for statutory analysis.

When conducting a statutory analysis, courts start with an interpretation of the plain meaning of a statute, considering the ordinary, common-sense meaning of the words. *See Muszynski*, 268 F.3d at 98; *Chevron*, 467 U.S. at 843. If the plain meaning is susceptible to multiple reasonable meanings, courts turn to the canons of statutory construction and consider the entire statute in all its part, subsequent statutory amendments, and any internal inconsistencies. *See Dauray*, 215 F.3d at 262-64. Finally, courts resort to other interpretive aids,

such as legislative history, to resolve statutory ambiguity before deferring to the Agency's reasonable interpretation. *See Muszynski*, 268 F.3d at 98; *see also EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) ("It is by now a commonplace that when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.") (internal quotations omitted).

In the present case, the district court determined EPA's interpretation of the term "daily" contradicted the plain meaning of the statute, finding that the annual limit established in the Agency's adopted TMDL is not a daily limit and therefore fails to allow for seasonal variations. R. at 14-15. The district court is not alone in limiting the definition of "daily" to its plain meaning. *See Friends of Earth*, 446 F.3d at 144 (holding that the CWA unambiguously required establishment of *daily* loads) (emphasis added). However, the court's overly narrow reading of the statute and other circuits that have found similarly fail to consider the overall structure and purpose of the CWA. *See Muszynski*, 268 F.3d at 98; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 245 (D.D.C. 2011).

For example, in a memorandum opinion, the District Court for the District of Columbia concluded that "there is nothing incongruous about establishing daily pollutant load limits to meet water quality criteria expressed as another timeframe—such as a seasonal average." *Anacostia Riverkeeper*, 798 F.Supp.2d at 245. The court pointed specifically to section 303(d) of the CWA, concluding that the Act's "references to water quality standards require only that a TMDL set load levels necessary to attain and maintain applicable water quality standards… and does not otherwise refer to any particular timeframe." *Id.*

Likewise, in *Natural Resources Defense Council, Inc. v. Muszynski*, the Court of Appeals for the Second Circuit held that the CWA does not require that all TMDLs be expressed strictly

in terms of daily loads because EPA has discretion to approve TMDLs expressed in other periodic measurements where those differing measurements are best suited to regulating a given pollutant. *See* 268 F.3d at 103. Although the Second Circuit ultimately found that there was insufficient evidence to support EPA's establishment of a phosphorous TMDL measures in terms of annual loads, the court concluded that the term "total maximum daily load" is not limited to the narrow meaning of the plain statutory language but is instead susceptible to a broader range of meanings. *See id.* at 98 ("We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis."). The court reasoned that the overall structure and purpose of the CWA "contemplates the establishment of TMDLs for an open-ended range of pollutants that are susceptible to effective regulation by such means." *Id.* Because each pollutant enters, interacts with, and adversely impacts an affected waterbody under different conditions, effective enforcement of the CWA requires analysis and application of information concerning a broad range of pollutants, since some pollutants may be effectively regulated by some periodic measure other than a daily one. *See id.* The court emphasized that in cases of less toxic pollutants, such as phosphorus, "the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately." *See id.* Accordingly, a "total maximum daily load" may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies. *See id.* at 99.

Considering the circuit court split in interpreting the meaning of "total maximum daily load," the district court erroneously decided to accept the plain meaning of the statute without acknowledging the inherent ambiguity of the statutory language or considering other canons of

statutory construction, such as accounting for legislative purpose. *See Dauray*, 215 F.3d at 262-64. The CWA is intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under section 303(d), a TMDL shall be established "*at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety." *See id.* § 1313(d)(1)(c). Limiting the establishment and effective enforcement of TMDLs to daily load measurements contravenes legislative intent because individual pollutants adversely impact waterbodies in different ways, and the measurement of pollutant loadings should not be restricted to a standard daily timeframe when other methods of measurement would better serve the purpose of effective regulation of pollutant levels in waterbodies. *See Muszynski*, 268 F.3d at 98.

As the Second Circuit properly concluded, the term "total maximum daily load" is not limited to the narrow meaning of the plain statutory language but is instead susceptible to a broader range of meanings. *See id*. To address the issue of ambiguity in the statutory language, the district court should have examined the entire statute in all its part and considered legislative intent to resolve the ambiguity. *See Dauray*, 215 F.3d at 262-64.

B. EPA has broad regulatory authority to interpret the CWA, and the Agency's interpretation of "total maximum daily load" should be afforded substantial deference and should not be disturbed unless there is evidence of an abuse of discretion.

When interpreting ambiguity in the CWA, the Supreme Court has held that where Congress has explicitly left a gap in a federal statute, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *See Chevron*, 467 U.S. at 843-44; *see also Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created… program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). Such legislative regulations are given controlling weight unless they are arbitrary,

capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-44. Accordingly, courts will defer to an administrative agency's interpretation of a statutory provision when it appears that Congress delegated authority to the agency to create rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *See Mead Corp.*, 533 U.S. at 226-27.

For instance, in *Pronsolino v. Nastri*, the Ninth Circuit Court of Appeals concluded that courts owe substantial deference to EPA's interpretation of the Clean Water Act and are required to uphold the Agency's reasonable interpretation. *See* 291 F.3d at 1129. In addressing the issue of whether EPA's interpretation of section 303 should be afforded *Chevron* deference, the Ninth Circuit maintained that the CWA "delegates to EPA the general rule-making authority necessary for the agency to carry out its functions under the Act." *See id.* at 1132. Because EPA regulations pertinent to section 303(d)(1) lists and TMDLs focus on the attainment of water quality standards, regardless of the source of the pollution, the court found that the Act authorized EPA to establish TMDLs for any polluting source including nonpoint source pollutants. *See id.* at 1132-33 ("In short, EPA's regulations concerning § 303(d)(1) lists and TMDLs apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two."). Therefore, the court gave deference to EPA's interpretation of section 303 because, among other reasons, EPA had specialized experience regarding the Clean Water which the court lacked. *See id.* at 1133-34 ("Congress entrusted to EPA the responsibility of approving or disapproving § 303(d)(1) lists, bestowing upon it the discretion that comes with such responsibility.").

Here, CLW argues that EPA's TMDL allowing for a phased percentage reduction in phosphorus loadings measured at an annual rate fails to adequately assure achievement of water

quality standards. R. at 14. The district court agreed and declined to give deference to EPA's decision because "section 303(d)'s direction to calculate a total maximum daily load…at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety" does not authorize loading standards that fail to achieve water quality standards until five years later. R. at 15. Both CLW and the district court fail to recognize the specialized experience that EPA holds in interpreting and executing the objectives of the Clean Water Act. *See Pronsolino*, 291 F.3d at 1134. Congress entrusted EPA with the responsibility of approving or disapproving proposed TMDLs submitted to the Agency, bestowing upon it the discretion that comes with such responsibility. *See id.* EPA's adoption of a TMDL consisting of an annual pollution loading reduction to be phased in over five years must be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *See Chevron*, 467 U.S. at 843-44. There is no indication that the Agency's determination was arbitrary and capricious, nor have plaintiffs made such a claim. Accordingly, because Congress delegated broad authority to EPA to interpret and administer the statutory provisions of the CWA, the court should defer to EPA's interpretation of section 303(d)(1)(c) and rule that a TMDL allowing for a phased percentage reduction in phosphorus loadings measured at an annual rate is valid. *See Mead Corp.*, 533 U.S. at 226-27.

IV. EPA's adoption of a credit for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was not arbitrary and capricious or an abuse of discretion due to the lack of assurance of BMP implementation.

The district court properly concluded that EPA's suggestion to offer credits for nonpoint source BMPs as a method of offsetting point source reductions was not arbitrary and capricious because EPA is not required to provide a "reasonable assurance" that pollutant loading reductions will be achieved through the nonpoint source BMPs. *See Am. Farm Bureau*, 792 F.3d

at 300, 307 (stating that the reasonable assurance requirement may be imposed on states to help guide EPA's discretion in determining whether to approve a TMDL or a state's mandatory continuing planning process). Even if the Court determines that credits for nonpoint source BMPs requires a reasonable assurance, EPA's decision to offset point source pollutant loading reductions with nonpoint source BMPs is not arbitrary and capricious because the Agency's decision was reasonably based on relevant factors and supported by EPA's interpretation of the Clean Water Act. *See Muszynski*, 268 F.3d at 97 (explaining the arbitrary and capricious standard of review) (finding that EPA's determination that New York can formulate its TMDL for phosphorus using an aesthetic criterion is not arbitrary and capricious when the Agency had incomplete or disputed scientific data concerning the specific conditions of New York's reservoirs and its optimum phosphorus levels).

Chesaplain Lake Watch asserts that EPA must provide a "reasonable assurance" that pollutant loading reductions will be achieved through the nonpoint source BMPs, arguing that New Union had no intention to require implementation of the BMPs and, thus, EPA's adoption of nonpoint source BMPs to offset point source pollutants is arbitrary and capricious. R. at 15-16. As the district court properly held, this argument fails because EPA has never adopted the "reasonable assurance" standard. R. at 16. Although EPA may, at its discretion, require states to provide reasonable assurances for its proposed standards to ensure that the Agency exercises "reasoned judgment" in its evaluation, EPA itself is not required to provide a reasonable assurance standard for its proposed TMDLs. *See Am. Farm Bureau*, 792 F.3d at 300 (concluding that EPA was authorized to require states to submit reasonable assurances in their proposed TMDLs concerning the Chesapeake Bay TMDL).

Furthermore, CLW incorrectly claims that New Union's failure to implement the BMPs indicates that EPA's action was arbitrary, capricious, and contrary to law. R. at 16. TMDLs are not self-enforcing but instead serve as an informational tool or goal for the states to establish further pollution controls. *See City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005); *see also Pronsolino*, 291 F.3d at 1129 ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans."). TMDLs operate as a link in the implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters. *See Pronsolino*, 291 F.3d at 1129.

In its decision, the district court repeatedly stated that the "TMDL program is a planning and information program, not an implementation program. EPA's TMDL provides New Union with information concerning possible BMPs *that might be used* to achieve compliance with water quality standards." R. at 16 (emphasis added). EPA exercises authority over state management programs and must approve them, but the Clean Water Act generally leaves regulation of non-point source discharges through the implementation of TMDLs to the states. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *see, e.g.*, *D.C. v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) ("In considering the Clean Water Act, Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the states."); *Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 374-75 (D. Me. 2012) ("The states…have the primary responsibility to establish water quality standards.").

Under section 101 of the CWA, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate

pollution…[and] that the States manage the construction grant program…and implement the permit programs." *See* 33 U.S.C. § 1251(b) (West 1987). Likewise, under section 319, which discusses nonpoint source management plans, "each State [shall]… prepare and submit to the Administrator for approval a management program which such State proposes to implement." *See* 33 U.S.C. § 1329(b)(1) (West 1998). Furthermore, the Supreme Court stated that "the structure of the [Clean Water Act] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States." *Cnty. of Maui, Haw. v. Hawaii Wildlife Fund*, 140 S.Ct. 1462, 1471 (2020). The Act envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants. *See id.*

Accordingly, in the present case, although EPA recommended offsetting point source pollutant loads with nonpoint pollutant BMP credits, New Union was not required to adopt EPA's suggestion and reserved the right to decline implementation. *See Meiburg*, 296 F.3d at 1026; *Hawaii Wildlife Fund*, 140 S.Ct. at 1471. The CWIP did not specify whether or how the proposed BMP measures would be enforced—it merely suggested that BMP credits offset point source pollutant loads to combat the damaging environmental effects that excessive nutrient phosphorus had on Lake Chesaplain. R. at 8. Because the purpose and function of TMDLs is to provides states with an informational tool or goal to establish further pollution controls, EPA's failure to include "reasonable assurances" for its nonpoint source BMP pollutant loading reductions was not arbitrary and capricious because the Agency is under no obligation to ensure that its recommendations will have the intended effect—that responsibility is left to the states.

See Meiburg, 296 F.3d at 1026; *City of Arcadia*, 411 F.3d at 1105; *see, e.g.*, *Schramm*, 631 F.2d at 860.

Even if this court determines that the CWA does require EPA to include a reasonable assurance in its proposed TMDL for Lake Chesaplain, the Agency's decision to offset point source pollutant loading reductions with nonpoint source BMPs still cannot be considered arbitrary and capricious because the determination was reasonably based on relevant factors, including but not limited to the substantial contribution of phosphorus loadings into the Lake Chesaplain watershed created by the hog CAFOs and other nonpoint sources. *See Costle*, 657 F.2d at 323 (finding that the Agency has exercised reasoned discretion when it considers all of the relevant factors and demonstrates a reasonable connection between the facts on the record and the resulting policy choice).

Under the Administrative Procedure Act, a court may set aside agency action, findings, and conclusions that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(a) (West 1966). Review under this provision is narrow and limited to examining the administrative record to determine "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Muszynski*, 268 F.3d at 97 (quoting *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994)). While the court may not substitute its judgment for that of the agency, an agency decision may be set aside where 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. *See id.* (internal quotations omitted).

The circuit courts are inclined to uphold and defer to EPA's interpretation of a federal statute when the Agency has exercised reasoned discretion, considered all relevant factors, and demonstrated a reasonable connection between the facts on the record and the resulting policy choice. *See Costle*, 657 F.2d at 323; *see e.g.*, *Maryland v. EPA*, 958 F.3d 1185, 1208-10 (D.C. Cir. 2020) (finding that EPA reasonably explained its predictive judgment in concluding that Brunner Island had not violated its Good Neighbor obligations under the Clean Air Act); *Sierra Club v. Johnson*, 541 F.3d 1257, 1264 (11th Cir. 2008) (finding that EPA Administrator's order is not arbitrary, capricious, or an abuse of discretion and concluding that EPA offered a reasonable interpretation of the Clean Air Act that deserves deference); *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1144-45 (9th Cir. 2015) (finding that EPA's decision not to require complete replacement of the existing control systems for SO2 emission was arbitrary and capricious because the Agency did not offer a reasoned explanation supporting its decision). Furthermore, where there is ambiguity in the language of the federal statute or conflicting scientific evidence to support EPA's decision, the courts' deference should be at its greatest. *See Muszynski*, 268 F.3d at 101 (quoting *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 90 (2d Cir. 2000)); *see also Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983) (holding that EPA's failure to require biological monitoring was not arbitrary and capricious because the Clean Water Act gives EPA discretion to require such monitoring, and Webb has made no effort to show why the action here is an abuse of that discretion).

For example, in *Citizens Coal Council v. EPA*, EPA did not act contrary to law, arbitrarily or capriciously when including BMPs effluent limitations in the guideline for the coal remining subcategory. *See* 447 F.3d at 897. The U.S. Court of Appeals for the Sixth Circuit held that EPA's decision to incorporate numeric and non-numeric BMPs in the effluent

guidelines was reasonable because the Agency based its decision on numerous site analyses, an exhaustive review of BMP technology, and a thorough consideration of available alternative coal remining technology. *See id.* at 899 ("Because BMP technologies had been proven to reduce pollutant loadings at remining sites, EPA deemed it preferable to allow the use of BMPs rather than no action…[which] is entirely consistent with the CWA's goal of eliminating water pollution."). Therefore, unless EPA's interpretation of a CWA provision is unreasonable and unsupported by relevant factors demonstrating a reasonable connection between the facts on the record and the resulting policy choice, courts will uphold the Agency's decision and defer to its reasonable exercise of authority. *See Citizens Coal Council*, 447 F.3d at 895-97; *Costle*, 657 F.2d at 323.

In the present case, EPA's determination to offset point source pollutant loadings with nonpoint source BMPs was not arbitrary and capricious because the Agency reasonably based its decision on specific, relevant factors. *See Costle*, 657 F.2d at 323. For instance, the 2012 Chesaplain Report explained that excessive amounts of the nutrient phosphorus were causing the excess algae growth and, as a result, produced objectionable odors, decreased water clarity, and a decrease in dissolved oxygen levels needed for a healthy fishery. R. at 8. The Chesaplain Commission's Supplemental Report determined that the "non-discharging" hog CAFOs and private septic systems, both of which are exempt from federal permitting requirements, contributed substantial phosphorus loadings to the Lake Chesaplain watershed through groundwater flows and surface runoff. R. at 9. Based on these facts, EPA exercised reasoned discretion, considered all relevant factors, and promulgated the CWIP, incorporating the entire record of scientific reports and public comments before the DOFEC into its own record. *See Costle*, 657 F.2d at 323. EPA found and demonstrated a reasonable connection between the

Commission's findings on phosphorus loadings from non-permitted polluting sources and its choice to recommend offsetting point source pollutant loads with nonpoint source BMPS. *See id.*

CONCLUSION

For the foregoing reasons, EPA respectfully requests that this Court affirm the district court's grant of partial summary judgment for EPA, reverse the district court's grant of partial summary judgment for CLW and New Union, and remand for further proceedings consistent with this decision.