UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

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 in consolidated case nos. 66-CV2020
and 73-CV-2020, Judge Romulus N. Remus

BRIEF OF PLAINTIFF-APPELLANT-CROSS APPELLEE, CHESAPLAIN LAKE WATCH

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INTRODUCTION

Water quality is an issue negatively affecting communities throughout the country as people are faced with the negative effects of poor drinking water quality. *Drinking- Water* World Health Organization, https://www.who.int/news-room/fact-sheets/detail/drinking-water (Last visited Nov. 22 2021). Poor water quality is linked to poor sanitation and can lead a host of health problems including but not limited to cholera, diarrhea, dysentery, hepatitis A, typhoid, and polio. *Id.* Inadequate management of resources and wastewater had lead to hundred of millions of people with dangerous contaminated drinking water full of harmful chemicals.

Despite being one of the wealthiest countries in the world the United States has lots of problems with chemical contamination of its drinking water. *A Crisis of Confidence in America's Tap Water* The Wall Stree Journal, https://www.wsj.com/articles/a-crisis-of-confidence-in-americas-tap-water-11633699487 (Last visted Nov. 22 2021). Aging infrastructure and lack of regulation has lead to a crisis of confidence in Americans from Michigan to West Virginia where residents do not feel comfortable drinking their tap water. *Id.* There have been several incidents of residents finding out their water was poisoned by these contaminants after it was already too late.

The Clean Water Act was created by the Federal Water Pollution Control Act Amendments of 1972 with the goal of establishing comprehensive regulation for point source discharge of pollutants into U.S. waters through a permitting system. CWA §502(14), 33 U.S.C. § 1362(14). The Clean Water Act was implemented with the goal of fixing many of the problems listed above. *Id.* Under the CWA's "cooperative federalism" scheme the EPA establishes national standards that states implement under their own regulatory programs. *See New York v. United States.* This is implemented by the EPA creating a water quality standard creating and

then from that in conjunction with state data creating a Total Maximum Daily Load for bodies of water and the states implementing this through waste load allocation permits and best management practices for load allocations. *Id.* The issues in question have to do with the implementation of the Clean Water Act and if the EPA is properly protecting U.S. Citizens.

JURISDICTIONAL STATEMENT

Chesaplain Lake Watch (CLW) appeals the decision and order granting summary judgment in favor of the EPA using nonpoint source Best Management Practices (BMPs) as an offset to point source regulations as a matter of planning for water standard compliance entered on September 1st 2021 by the honorable judge Romulus N. Remus in the United District Court for the District of New Union in consolidated case Nos. 66-CV-2020. The Chesaplain Lake Watch asks the court to uphold the decision and order granting summary judgment in favor of CLW determining that the EPA unlawfully defined the Total Maximum Daily Load (TMDL) and that the EPA's adoption of the TDML for the Chesaplain Lake Watch violates the Clean Water Act (CWA).

The District Court has subject-matter jurisdiction under the judicial review provision of the Administrative Procedure Act. 5 U.S.C. § 702. The District Court has additional jurisdiction under original federal question jurisdiction because this civil action is derived from laws of the federal government. 28 U.S.C. §1331. The Chesaplain Lake Watch, The State of New Union, and The United States Environmental Protection Agency all filed all notices of appeal in a timely manner pursuant to rule 4 of the federal rules of appeals. Fed. R. App. P. 4. The Court of Appeals for the Twelfth Circuit has jurisdiction for this appeal under 28 U.S.C. § 1291, which allows federal appeals courts to hear appeals of final decisions from federal district courts within their geographic zones. 28 U.S.C. § 1291. A decision granting summary judgement is considered

a final decision and therefore can be appealed to a higher court. *Bullard v. Blue Hills Bank,* 575 U.S. 496, 501 (2015).

STATEMENT OF THE ISSUES

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

II. 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).

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

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

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act was created by the Federal Water Pollution Control Act Amendments of 1972. The Clean Water Act established comprehensive regulation for point source discharge of pollutants into U.S. waters through a permitting system. CWA §502(14), 33 U.S.C. § 1362(14). Point sources generally include pollution discharge from pipes and concentrated animal feeding operations that discharge into waters. *Id.* The Environmental Protection Agency (EPA) administers the Clean Water Act. *Id*. The EPA does this by using technology- based standards and desired drinking water standards to establish individual numerical permit limits for point sources. *Id*. Nonpoint pollution, mostly made of agricultural runoff and other unchanneled pollution, is not regulated by the CWA. *Id*. Under the CWA's "cooperative federalism" scheme the EPA establishes national standards that states implement under their own regulatory programs. See *New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). States are expected to administer permitting and water quality aspects of the CWA.

The Clean Water Act (CWA) authorizes the EPA to establish a single total load for a particular pollutant but does not allow the EPA to determine how this load is achieved. Guidance for Water Quality-based Decisions: The TMDL Process, 440/4-91 Assessment and Watershed Protection Division E.P.A. Washington, D.C. 1, 15 (1991). EPA defines a TMDL as "the sum of individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i), R. at 6. The Clean Water Act does not provide the EPA with wider control of nonpoint source pollution (LAs). *Id*. The Clean Water Act does, however, provide for wider EPA control of point source pollution (WLA).

B. Best Management Practices

Best Management Practices are state level pollution control measures, that are in part determined by federal decisions. The federal government establishes national water quality standards and the Clean Water Act § 303(a) requires states to adopt these standards. 33 U.S.C. § 1313(a). States must review and revise water quality standards at least every three years. 33 U.S.C. § 1313(c)(2)(A). Once a start has established water quality standards for a waterbody it must determine if the implementation of technology-based point source controls will get to the required water quality standard. See CWA § 303(d), 33 U.S.C. § 1313(d), CWA § 301(b)(1), 33 U.S.C. § 1311(b)(1). Any waters that do not meet the water quality standard have to be added to the impaired waters list and the list is sent to the EPA. 40 C.F.R. § 130.7(d).

When a waterbody is impaired, the state has to set a total maximum daily load for each pollutant outside the water quality standard and submit this to the EPA. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). As part of this total maximum daily load, a state must allocate the amount of pollutant each Clean Water Act permitted point source polluter may emit into the waterbody. *Id*. Under current EPA policy a state may decide to reduce the amount of permits it distributes for point source or it may implement Best Management Practice on nonpoint sources to reduce that source of pollution. 40 C.F.R. § 130.2(i). The EPA than must approve of this plan for it to take action. *See* 33 U.S.C. § 1313(c)(3), (d)(2).

C. Current Proceedings

Lake Chesaplain is a treasured natural resource, as well as a valuable economic resource, for the people of the State of New Union. R. at 7. Fifty-five miles long and five miles wide, the lake is bounded by national forest and Chesaplain State Park, which provides hiking, boating, and fishing recreation for local residents and tourists alike. R. at 7. Lake Chesaplain is also bounded by agricultural land and a stretch of residential and second homes. R. at 7. The lake is

fed by the Union River, which runs through the City of Chesaplain Mills, and drains into the Chesaplain River, an interstate body of water. R. at 7. Before the twenty-first century, Lake Chesaplain featured beautiful clear water, which attracted tourists from all around the region to boat and fish; some of these tourists found the area so beautiful that they built second homes around the lake. R. at 7.

However, beginning in the 1990's, several factors combined to begin a degradation in the quality of this once-beautiful lake. R. at 7. Primarily, ten large-scale concentrated animal feeding operations ("CAFOs") were built along Union River. R. at 8. These CAFOs drove the construction of a slaughterhouse in Chesaplain Mills, which processes more than fifty million pounds of pork per year. R. at 8. These operations aren't included under Clean Water Act ("CWA") permitting plans, despite CAFOs being included as "point sources" under the CWA, but they are regulated by New Union statute. R. at 8. In addition, Lake Chesaplain's eastern shore experienced a construction boom stemming from the lake's recreational popularity, leading to second-home construction, including unregulated septic leach fields. On top of these discharging bodies, Chesaplain Mills has a permitted sewage treatment plant discharging directly into Lake Chesaplain.

Lake Chesaplain's clear waters degraded noticeably during the 2000's. R. at 8. Far from being the crystal-clear mecca for recreation and tourism that it had historically been, the modern Lake Chesaplain features vast mats of algae, which not only give off an awful odor, but affect the productivity of Lake Chesaplain's valuable fish population. R. at 8. The water quality decline was so severe that swimming at Chesaplain State Park was prohibited. R. at 8. This prohibition caused tourism to grind to a halt, and property values in the vacation communities plummeted. R. at 8.

New Union created the Lake Chesaplain Study Commission in 2008, with the purpose of investigating the decline in water quality. R. at 8. The Study Commission issued a report in 2012, which outlined several dire conclusions about the state of Lake Chesaplain. R. at 8. Namely, the Commission found that Lake Chesaplain was suffering from eutrophication, which means that the lake is slowly dying, due to the excessive algae. R. at 8. The Commission found that the algae was responsible for odors, clarity problems, and reduction in fish populations. R. at 8. The commission also reached the conclusion that the algae causing the problems in Lake Chesaplain was growing due to excess phosphorous, and determined that, while levels of phosphorous varied, at the very minimum, they were at least 1.4 times more than the maximum levels that a healthy Lake Chesaplain could support. R. at 8. The Commission determined that the maximum phosphorous level that would keep Lake Chesaplain healthy was .014 mg/l. R. at 8. Following the 2012 report from the Commission, DOFEC adopted a WQS that included a standard of .014 mg/l of phosphorous. R. at 8. As this was not being met, DOFEC designated Lake Chesaplain as "impaired" on a list submitted to the EPA in 2014. R. at 8. However, DOFEC did not submit a TMDL at that time. R. at 8.

In 2015, Chesaplain Lake Watch served notice on both New Union and the EPA, threatening to sue over the failure to form a TMDL for Lake Chesaplain, but agreed to refrain from suit as long as New Union produced a TMDL. R. at 8. By 2016, the Commission produced a report calculating the amount of phosphorous consistent for reaching the scientific standard and identifying the sources emitting phosphorous into the lake. R. at 8. This load was calculated at 120 metric tons (mt) annually, with existing loads as of 2015 calculated per source, with the greatest contributors being the new CAFOs, the slaughterhouse, and Chesaplain Mills. R. at 9.

Despite the CAFOs status as "non-discharging," the report specifically determined that

they were substantial contributors to the phosphorous overload contributing to the decline in Lake Chesaplain. R. at 9. They also determined that, though they were regulated through local permitting, residential septic systems were a significant contributor. R. at 9.

DOFEC's 2017 TMDL included a phased reduction of both point and nonpoint sources over five years, with a stepped-up reduction per year. R. at 9. DOFEC's 2017 TMDL included permit limits for point source reductions, and proposed local programs to reduce CAFO and other nonpoint source phosphorous. R. at 9. This stepped reduction was highly controversial, with the nonpoint source contributors objecting to the expense, and the Chesaplain Lake Watch objecting to taking on the challenge of regulating nonpoint source pollution. Specifically, Chesaplain Lake Watch believed that a stepped reduction was inconsistent with the CWA because the statute specifically requires a daily limit rather than an annual limit. R. at 10. The CAFOs suggested their own TMDL that had no specific point and nonpoint source requirements, to avoid the financial hit of controlling their phosphorous loading from manure spreading. R. at 9.

Despite the continued controversy, in 2018 DOFEC adopted a TMDL that solely consisted of a 120 mt maximum, with no waste load allocations, per the suggestion of the CAFOs. R. at 10. The EPA rejected DOFEC's 2018 TMDL proposal, and adopted DOFEC's earlier proposal of a stepped reduction with point and nonpoint allocations. R. at 10. This plan was known as the Chesaplain Watershed Implementation Plan (CWIP), and it didn't include specific measures by which allocations and BMP measures would be enforced. R. at 20.

Currently, and throughout this action, permits have been allowed to expire for the slaughterhouse and the Chesaplain Mills sewage treatment plan, and they are unregulated. R. at 10. DOFEC proposes to reissue permits with their phased-reduction phosphorous amounts. R. at

10. CAFO permits have not been modified to reflect the need for reducing phosphorous. R. at 10. Most importantly, however, Lake Chesaplain waters are still impaired, and continue to violate water quality standards. R. at 10.

SUMMARY OF THE ARGUMENT

The Chesaplain Lake Watch is appealing in part and asking to affirm in part the judgement of the district court in this case. First, the district court was correct in determining that the implementation of the Chesaplain Lake Watershed plan is ripe for judicial review. Second, the district court incorrectly decided that the EPA's definition of total maximum daily load was contrary to law. Third, the district court correctly decided that a total annual pollution load, to be phased in over the course of five years, violates the Clean Water Act. Fourth, the district court incorrectly decided that the EPA's decision to reduce the stringency of waste load allocations for point sources for the implementation of the Lake Chesaplain TMDL was not arbitrary and capricious because of a lack of assurance of BMP implementation.

First, the district court correctly decided that the implementation of the Chesaplain Lake Watershed plan is ripe for judicial review. The plan is ripe for judicial review because the issue is fit for judicial determination, and the complaining party will experience hardship without judicial remedy. An issue is ripe for judicial review when all parties agree it is a purely legal issue, when the regulations at issue are a final regulatory action and the impact of the regulation is sufficiently direct and immediate. It is undisputed that all parties agree that the issue is purely legal and that the regulations at issue are a final regulatory action.

The regulation does have a sufficiently direct and immediate impact on the Chesaplain Lake Watch. When a rule lays an immediate burden on the party it is sufficiently ripe. The

Chesaplain Lake Watch has the immediate burden of current negative impacts on the Lake's ecosystems including eutrophication, unpleasant odors, clarity problems, and decline in fish populations. The lack of current active permits means there is no control over the current pollution levels and therefore has exacerbate those problems. Therefore, the issue of whether the implementation of the Chesaplain Lake Watershed plan is ripe for judicial review.

Second, the district court incorrectly found the EPA's definition of the Total Maximum Daily Load was contrary to law. The EPA is within its authority to interpret of the term "total maximum daily load" as it appears in the Clear Water Act § 303(D). The EPA's inclusion of wasteload allocations and load allocations is not arbitrary and capricious or an abuse of discretion because it is tailored to the EPA's goal of protecting water quality. Without the inclusion of wasteload allocations and load allocations the EPA will have no reasonable alternative to properly reach its goal therefore it is not arbitrary nor capricious.

Third, the district court was correct in deciding that the Total Maximum Daily load a total annual pollution load, to be phased in over the course of five years, violates the Clean Water Act. The Clean Water Act requires a *Total* Maximum *Daily* load, and both the words total and daily are unambiguous. The word "total" must contain the amounts of pollution from both point and non-point sources, indicating that a phased-in approach for reduction is insufficient. The word "daily" means that a load measurement must be compiled for one day.

The Environmental Protection Agency Total Maximum Daily Load violates the Clean Water Act because it fails to adhere to the definition of the words "total" and "daily"" and should therefore be vacated. Though Agencies have been given deference in how to interpret Congressional intent, there must be sufficient flexibility in the phrasing of the statute to allow for

deviations. The use of the words "total" and "daily" within the definition of "total maximum daily load" indicates a Congressional intent to create a daily calculation. Because the Environmental Protection Agency's solution does not follow Congressional intent, nor does it follow current caselaw, it is contrary to law; therefore, the district courts determination to vacate the Environmental Protection Agency TMDL should be upheld.

Fourth, the district court incorrectly decided that the EPA's decision to reduce the stringency of waste load allocations for point sources for the implementation of the Lake Chesaplain TMDL was not arbitrary and capricious because of a lack of assurance of Best Management Practices implementation. The decision was arbitrary and capricious because it required the EPA to rely on load allocation reductions coming from Best Manage Practices that the EPA had not ability to control or enforce. Additionally, the Load Allocations are too difficult to track to accurately include in a numerical total daily maximum.

STANDARD OF REVIEW

The standard of review is de-novo review because the issues fall under original federal subject matter jurisdiction. *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016). Courts always have a duty to inquire into jurisdiction even when parties to the litigation do not raise the issue. *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009). A district court's decision on summary judgement is also addressed through de-novo review because it is a final decision. . *See*, e.g., *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998); *Gasner v. Bd. of Supervisors of the City of Dinwiddie, Va.*, 103 F.3d 351, 356 (4th Cir. 1996); *Twiss v. Kury*, 25

F.3d 1551, 1554 11th Cir. 1994). Summary judgement should be granted if there is no genuine dispute of material fact. Fed. R. Civ. P. 56(c).

ARGUMENT

I. THE EPA'S DETERMINATION TO REJECT THE NEW UNION CHESAPLAIN WATERSHED PHOSPHORUS TMDL AND ADOPT ITS OWN TMDL AND IMPLEMENTATION PLAN FOR THE LAKE CHESAPLAIN WATERSHED IS RIPE FOR JUDICIAL REVIEW

The EPA's determination to reject the New Union Chesaplain Watershed phosphorus TMDL and adopt its own TMDL and implementation plan for the Lake Chesaplain Watershed is ripe for judicial review. An agency's action is ripe for judicial review when the issue is fit for judicial determination and parties experience hardship without judicial remedy. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Or, an action is ripe for judicial review when harm results. *Id*.

Evaluating the fitness and hardship of an issue with regards to ripeness breaks down into three tests: (1) whether all parties agree that the issue is a purely legal one; (2) whether the regulations are a final agency action; and (3) whether the impact of the regulations is sufficiently direct and immediate. *Id*. The first two tests – the tests related to fitness – are undisputed. Objections to the actions of the EPA are legal and the EPA's determinations of TMDLs are final agency actions. *Id*. The third test – related to hardship – requires establishing that the impact of regulations can be sufficient even before an agency enforces them. *Id*.

In determining when harm has resulted, the Supreme Court has established that an action can be ripe for judicial review before enforcement of the action. *Id*. While the state of New Union has not yet experienced a detriment due to the EPA's determination, the issue is still ripe

for judicial review under allowance for pre-enforcement review as long as the statute does not preclude pre-enforcement review. *Id.* The text of the Clean Water Act does not preclude pre-enforcement review. CWA § 303.

Beginning with a challenge to an FCC rule refusing broadcast license to certain kinds of network affiliates, the Court held that "expected conformity to [the rule] causes injury" even though the FCC had not yet in actuality refused a license to any particular network. *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407 (1942). Fourteen years later, another FCC licensing rule was challenged pre-enforcement. *United States v. Storer Broadcasting Co.*, 352 U.S. 192 (1956). The Court held that the petitioner was "sufficiently aggrieved by the rule's promulgation" itself. *Id*. The Court reaffirmed this position in response to the ICC constricting an exemption. *Frozen Food Express v. United States*, 351 U.S. 40 (1956). Because the rule itself laid an "immediate burden" on the party, the issue was ripe before any enforcement of the change. *Id.*

The EPA's determination and adoption of a TMDL alone gives a burden to the state of New Union, because it forces New Union to promulgate potentially expensive state regulations to address the needs of the TMDL. Added with the existing consensus that an agency determination is a purely legal issue and that the regulations are a final agency action, the EPA's actions with regard to the New Union Chesaplain watershed phosphorous TMDL are ripe for judicial review.

II. 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 ALLOCATION IS NOT CONTRARY TO LAW, AS AN INCORRECT INTERPRETATION OF THE TERM "TOTAL MAXIMUM DAILY LOAD" IN CWA § 303(D)

The 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 allocation is not contrary to law. The EPA is within its authority to interpret of the term "total maximum daily load" as it appears in the Clear Water Act § 303(D).

The EPA is given deference in its agency actions, per the *Chevron* doctrine. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The exceptions to this deference are outlined in the Administrative Procedure Act § 706(2):

> the Court may hold unlawful and set aside agency action, findings, and conclusions found to be— arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law;

None of these exceptions apply in this case. The EPA's inclusion of wasteload allocations and load allocations is not arbitrary and capricious or an abuse of discretion because it is tailored to the EPA's goal of protecting water quality. According to Title 33 of the United States Code, the purpose of water pollution prevention is to "...restore and maintain the chemical, physical, and biological integrity." 33 USC § 1251. Regulating wasteload and load allocations is central to managing pollution levels in the Chesaplain watershed.

Additionally, the EPA's determination is not arbitrary and capricious or an abuse of discretion because it does not violate congressional intent. On the issue of the EPA's authority to establish TMDLs, the Third Circuit states that Congress's silence on the process of determining a TDML and Congress's affirmative intent that TMDLs are for waters that cannot be protected by point-source limitations alone give authority to the EPA to include wasteload allocations and load allocations, at the EPA's discretion. *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281 (3d Cir. 2015).

The Court considered the text of the statute and the congressional record in holding that Chevron's rule ultimately supported the EPA's authority to set and make decisions with regards to wasteload allocations and load allocation. *Id.* The EPA is aligned with the statutory standards and there are no constitutional questions involved in this determination, so the EPA is not in violation of the law.

III. THE EPA'S ADOPTION OF A TMDL THAT CONTAINS A TOTAL ANNUAL POLLUTION LOAD, TO BE PHASED IN OVER THE COURSE OF FIVE YEARS, VIOLATES THE CWA, AND AS SUCH, THE COURT SHOULD UPHOLD THE LOWER COURTS DECISION TO VACATE IT AND RETURN TO THE INITIAL TMDL

The EPA's TMDL contains specific provisions for an annual phosphorous pollutant load to be phased in over the course of five years, at a seven percent increase per year. This is in violation of the plain language interpretation of CWA § 303(d) because § 303(d) requires a *total* maximum *daily* load that is sufficient to mitigate pollution in an impaired body of water. Courts have unilaterally held that the word "total" is unambiguous, and must contain the maximum daily amounts of a particular pollutant from both point and non-point sources, which indicates that a phased-in approach for reduction is insufficient. Courts have also held that the word "daily" is similarly unambiguous, meaning that a load measurement must be compiled for one day. The exception to this is comes from a single case that held that, following extensive scientific analysis, the calculation of an average daily load over the course of a month was the only way to feasibly measure a pollution load, due to the mechanism used for calculation. Because this exception only provides a way to create an average daily load from an averaged thirty-day total, it does not provide the EPA with enough guidance that they may use it to issue a TMDL that deviates from the "daily" standard established by Congress in such a way that the "daily load" requirement is an annual calculation.

Because the EPA has failed to adhere to Congressional intent behind the CWA, and the plain-language interpretation of the words "total" an "daily" within the Statute as decided through court cases, the TMDL promulgated by the EPA violates the CWA, and must be vacated. The court should uphold the district court's findings.

A - The EPA's TMDL violates CWA § 303(d) because it fails to adhere to the definition of the words "total" and "daily'" and therefore, the court should uphold the lower court's grant of summary judgement in this matter.

1. **Statutory Construct**

CWA § 303(d) directs each state to adopt water quality standards for waters within its borders, based on the designated use of those waters. When a body of water fails to meet these standards, the state must list it as impaired. Water quality standards must be revised at least every three years or as necessary, and once a water is listed as impaired, the state must develop and submit to the EPA Administrator a TMDL for the applicable pollutants. The EPA defines a TMDL as the "sum of individual [waste load allocations] for point source and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). Within CWA § 303(d), the statute reads that a state must establish a "total maximum daily load" at a level "necessary to implement the applicable water quality standards."

Though nonpoint sources are not regulated by the EPA, the city of New Union regulates certain nonpoint sources, particularly CAFOs, through local statute, creating BMP programs and permitting schemes to regulate pollutant load, allowing a collaborative scheme between state and EPA to repair the water quality of an impaired water body.

The CWA was created with the intent to be a cooperative effort between the EPA and States, as illustrated in the divide between EPA-regulated point-source pollution, and local

statutorily regulated nonpoint source pollutants, but a TMDL is, by definition, to include the *total* load of pollutants in an impaired body of water, not just the total EPA-regulated pollutant load.

2. **Congressional Intent**

Though Agencies have been given deference in how to interpret Congressional intent, there must be sufficient flexibility in the phrasing of the statute to allow for deviations. *Chevron, USA, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). The use of the words "total" and "daily" within the definition of "total maximum daily load" indicates a Congressional intent to create a daily calculation. The Clean Water Act had seven specific goals designed to ameliorate issues stemming from pollution, and to bring water quality in impaired waters back up. CWA § 303. These goals included eliminating discharge of pollutants by 1985 and developing mechanisms and procedures to control nonpoint source pollution.

3. Case Law Support

American Farm Bureau Federation v. EPA, 792 F.3d 281 (3rd Cir. 2015) - The Third Circuit, in a case eerily reminiscent of the case at hand, found that the phrase "total maximum daily load" was unambiguous, and didn't allow for creative construction in regard to the term "daily." The court in *Farm Bureau* did, however, find that the word "total" within the phrase "total maximum daily load" was not unambiguous enough to mean, as the plaintiff claimed, only the total pollutant amount. The court in *Farm Bureau* found that the phrase was ambiguous in regards to how the EPA was permitted to define "total," and the EPA went on to define "total" as allowing a TMDL by point and nonpoint subtotals with target times for compliance. The court in *Farm Bureau* found that the EPA could interpret, *inter alia*, allocations between point and

nonpoint sources, as well as target dates. The Court in *Farm Bureau* found that the CWA didn't explicitly state the extent to which the EPA could consider goals over time.

Natural Resources Defence Council, Inc. v. Muszynski, 269 F.3d 91 (2d. Cir. 2001) held that a TMDL may be created that uses another measure of time than just "daily" because, within the context of the measurements in question, an alternative measurement better suited the needs of pollution regulation, as the technology used for measuring the pollutant load was only effective over a longer time range. The TMDL in question specified a thirty-day measurement and then a daily "average."

San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd., 183 Cal. App. 4th 1110 (3d Dist. 2010) established that a thirty-day running average of loads in a water body was adequate for a TMDL, reasoning that because the measurement tools were only available on a monthly time basis, it was an acceptable deviation.

Friends of Earth, Inc. v. EPA, 446 F.3d 140 (D.C. Cir. 2006) held that the EPA could not approve annual or seasonal pollutant loads because the plain language of the statute read "daily." Further, the court mentioned an EPA regulation promulgated in 1979 (43 Fed. Reg. 60,665) that deemed that all pollutants were suitable for calculating daily loads, indicating that between the word "daily" being used in the statute, and the EPA's own decision that all pollutant loads COULD be calculated daily, it is clear that the definition of "daily' within TMDL is strict and literal.

City of Arcadia v. State Water Resources Control Bd., 135 Cal. App. 4th 1932, 4th Dist. 2006) stated that a TMDL violated the CWA because it specified a minimum reduction of pollution over a course of 14 years, rather than a maximum amount of pollution. Though the plaintiffs claimed that the "minimum reduction" was merely an inverse of the demanded

"maximum daily amount" of a particular pollutant, the court did not find their argument compelling, holding that deviating from the statutory requirements in this way did not provide the guidance intended by Congress, because "removing a minimum" of pollution did not address the amount of pollution entering a waterway, which is the focus of the CWA.

4. Application to Matter at Hand

Though the EPA maintains that their TMDL satisfies the CWA, it is clearly insufficient because it consists of a phased-in load limit over the course of five years, and uses an annual load rather than the statutorily mandated and congressionally intended daily load of phosphorous pollutant allowable.

The EPA may contend that cases such as *NRDC v. Muszynski* show a precedent for deviation from adherence to the statutory language, the case at hand is closer to that in *Farm Bureau*, which allowed flexibility on the word "total" with the express purpose of giving the EPA the ability to include (additional) nonpoint source pollutants. A majority of courts, as described above, have maintained that the flexibility in the interpretation of the word "daily" is not intended for an annual load TMDL, but for accounting for issues caused by available technology. Moreover, this flexibility is substantially one way; flexibility exists to account for more pollutant loads, not to skate the Congressional intent of reducing pollution.

Though the EPA maintains that their TMDL satisfies the CWA, it is clearly insufficient because it consists of annual pollution limits, when the statute specifies a daily number. Therefore, it fails the *Chevron* analysis for agency deference, and is arbitrary and capricious.

The statute specifies the words "total" and "daily" when describing the period of loading to be described in a TMDL. Examining the EPA's construction of "total" and "daily" in their

TMDL to mean "phased over five years" and "annually," it's not a reach to realize that the EPA's TMDL fails the first *Chevron* prong. This is supported by the holding from *Farm Bureau Federation*, which stated that the word "daily" in "total maximum daily load" was unambiguous.

Even if, as is possible given the holding in *Farm Bureau,* the court decides that the definition of "total" within the statute is ambiguous enough to allow the EPA to interpret "total" as "phased out over five years," the EPA's actions in choosing a phased TMDL still fail the second *Chevron* prong. Though the court gives considerable deference to an Agency interpretation, the question demanded by the second prong of *Chevron* is, "did the Agency make a reasonable policy choice" in interpreting. Here, it cannot be said that the Agency made a reasonable policy choice in their interpretation of the word "total," given that it is contrary to Congressional intent.

Though other courts have held that a time limit is an acceptable EPA addendum on a TMDL (*Farm Bureau*), the time limits in question were designed to incentivize compliance with the TMDL, not to delay it. The DOPEC TMDL provides clear numbers for an amount of phosphorous pollutant reduction that would be implementable immediately, more in line with the statute. Allowing a graduated reduction over the course of five years runs counter to the clear Congressional intent of the statute, as described by the goals of "eliminating pollution" as described above. *Farm Bureau,* though possibly a vector for the EPA to assert that they have the authority to interpret "total" to mean "phased out," ultimately does not provide a means to delay compliance. Rather, *Farm Bureau* provides a means of speeding up compliance with the CWA by allowing the EPA to establish deadlines for compliance.

The goals of Congress, as enumerated above, in writing the CWA make it plain that Congress had an ambitious view of what the CWA should enable. They clearly intended for pollution from both point sources and nonpoint sources to fall under the umbrella of the CWA, and they also intended for pollution to be eliminated, not merely phased out.

5. Conclusion: Argument A

Because the Congressional intent of the statute is to provide an ambitious plan to end water pollution, and because the only ambiguity in interpretation upheld by courts occurs when that ambiguity helps facilitate the regulation of pollution, the EPA's interpretation of "total" and "daily" is arbitrary and capricious, fails the *Chevron* test for agency deference, and should be vacated.

B - The EPA's TMDL violates CWA § 303(d) because the phased reduction of pollutants runs counter to Congressional intent and should therefore be vacated.

Even if the court finds that the EPA's interpretations of "total" and "daily" are allowable under agency discretion, the phased reduction of pollutants runs directly counter to Congressional intent behind CWA § 303(d), and should be vacated.

1. **Statutory Construct**

Leaving the linguistic statutory construction of CWA § 303(d) out, as it is more fully described above in III(A)(1), the discussion of statutory intent here is the key issue of interpretation. The statute demands a TMDL, and as discussed above, courts have interpreted both "total" and "daily" as largely unambiguous, unless including ambiguity in the word "total" to allow for increased protections, such as seen in *Farm Bureau*, or including ambiguity in the

word "daily" to allow for technological limitations on pollution measurement, such as in *NRDC v. Muszynski*.

2. **Congressional Intent**

Even supposing that the EPA's TMDL did pass the *Chevron* test, the applicable analysis in regards to this issue is whether the TMDL as promulgated by the EPA aligns with Congressional intent. Therefore, it is necessary to re-examine the purpose behind, and the legislative history of, the CWA.

As illustrated above, the CWA was written with specific goals toward cleaning watersheds and "...eliminating pollution." The CWA amended the Federal Water Pollution Control Act of 1948, following growing awareness of the dangers and damages of pollution, not just to the human population but to economic concerns. The seven goals of the CWA were designed to aid in the "[r]estoration and maintenance of chemical, physical, and biological integrity of Nation's waters." Among these seven goals are: eliminating discharge of pollutants, obtaining water quality levels that protect wildlife and recreation capabilities, and developing mechanisms or procedures to control nonpoint source pollution to allow the CWA to realize its goals. The TMDL provision of the CWA was intended to be one of these goals, as acknowledged in *Farm Bureau*, above.

3. Application to Matter at Hand

As an intended mechanism to effectuate the achieving of the CWA's goals, it is necessary for a TMDL to align with Congressional intent. Though the five-year phased-out TMDL issued by the EPA does provide a roadmap to eventual success, the five-year plan is egregious in not addressing the pollutant loads as they currently exist, particularly when the DOFEC TMDL that DOES address current phosphorous pollutant loads is available. The EPA may claim that the

decision in *Farm Bureau* allows for the EPA to set targeted reductions. However, the language in *Farm Bureau* does not show any precedent for a laxer interpretation of Congressional intent; rather, it shows a trend toward allowing the EPA more power to regulate pollution to *increase* the effectiveness of the CWA. Because the *Farm Bureau* precedent for allowing wider EPA interpretation of "total" within the statute shows a trend toward interpreting "total" as a tool to increase protections for waters, it is disingenuous to suggest that *Farm Bureau* precedent would allow the EPA in this situation to define "total" to allow a five-year phased-out plan that would continue to allow massive phosphorous pollution loads into Lake Chesaplain.

Further, the EPA's own decision that all pollutant loads have the capability to be calculated daily, combined with the existence of a TMDL that was sufficient, adhered to the Congressional intent and interpretations of the word "total" and did calculate daily loads of pollutants for Lake Chesaplain, indicates that, in this case, the EPA's deviation from the plain language of the statute was arbitrary and capricious, and not in line with the clear congressional intent and design for the CWA.

4. Conclusion: Argument B

Even in the alternative, that the court decides that the EPA did not violate the CWA for failure to defer to the clear language of the statute by interpreting "total" as "phased over five years," the Court still must consider whether this phased reduction scheme runs counter to Congressional intent. Because the legislative history of the CWA shows that Congress intended not just a reduction but an elimination of pollutants in waterways, the Court must find that the EPA ran afoul of the intent of Congress when failing to produce a TMDL that provided sufficient reductions in pollution load to comply with the CWA, particularly when a TMDL was promulgated that did address these concerns.

D. Conclusion

Because the EPA abused its discretion in both misinterpreting the word "daily" and the word "total" when creating its TMDL, their TMDL is insufficient as a matter of law and this Court should uphold the summary judgement findings of the District Court. In the alternative, if the Court finds that the EPA's interpretation of both "daily" and "total" was within the bounds of their discretionary powers under a Chevron analysis, the Court should still find that the EPA failed to consider the Congressional intent of the statute when interpreting "daily" and "total" and therefore, their TMDL is inadequate and the decision of the lower court should be upheld.

IV. THE EPA'S DECISION TO REDUCE THE STRINGENCY OF WASTELOAD ALLOCATIONS FOR POINT SOURCES FOR THE IMPLEMENTATION OF THE LAKE CHESAPLAIN TMDL WAS ARBITRARY AND CAPRICIOUS BECAUSE OF A LACK OF ASSURANCE OF BMP IMPLEMENTATION.

The EPA's decision to reduce the stringency of waste load allocations for the Lake Chesaplain Total Maximum Daily Load (TMDL) was arbitrary and capricious. The decision made by the EPA should be overturned even though *Chevron* deference applies because they did not have a reasonable interpretation of the statute. The Environmental Protection Agency (EPA) expanded the allotment of point source allocations (Waste Load Allocations), because it relied on a credit created by nonpoint source allocations (Load Allocations) to be created by state Best Management Practices (BMP). R. at 2. The Environmental Protection Agency has no authority to enforce the use of Best Management Practices for nonpoint sources; nor does the EPA does not have any assurance that it will be implemented. 40 C.F.R. § 130.2. Because the EPA does not have assurance of that Best Management Practices implementation it was an arbitrary and capricious decision to reduce the stringency of waste load allocations for the TMDL. 33 U.S.C. §1370. As a result of this decision being arbitrary and capricious, the decision of the district

court should be overturned, and the EPA's decision should be remanded for further consideration.

To determine whether or not the EPA's decision is arbitrary and capricious the court should follow the precedent set in *Chevron*. *Chevron,* U.S. at 837. The *Chevron* doctrine dictates how much deference is given to an agency when it is interpreting a statute which it administers. *Id.* The *Chevron* doctrine dictates a multistep analysis that the court must undertake. *Id.* In step zero the court decides whether an agency is analyzing a statute which it administers. *Id.* When a court determines an agency is construing its own statute it must answer two questions. *Id.* Step one, the court must ask whether Congress has directly spoken to the precise question at issue. *Id.* If Congress has spoken directly on the issue then strict scrutiny applies. If Congress has left the answer to the question ambiguous than the court interprets this as a direct delegation of power and moves on to step two of the analysis.. *Id.* Step two, if the statute is silent or ambiguous with respect to the issue the court must decide whether the agency's answer is based on a permissible construction of the statute. *Id.*

The EPA is analyzing the statute which it administers. So, we must move on to step one and two of the *Chevron* analysis.

1. *Chevron* Step One

Congress has spoken on the issue at hand. The issue currently being addressed is whether the Environmental Protection Agency (EPA) can reasonably rely on Load Allocations in addition to Waste Load Allocations in Total Maximum Daily Loads (TMDL). In *Chevron* the Supreme Court announced that when an agency is interpreting the statute it administers and "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency". *Chevron,* U.S. at 837. When it has been determined there is an express delegation of

authority to the agency the regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* It was later determined that when *Chevron* deference was appropriate the agency's interpretation of the statute was valid so long as it was reasonable. *Id.* The issue is clearly unambiguous because using load allocation is contrary to a total and the federal government cannot control load allocations so it is clear Congress did not intend for the EPA to rely on changes in load allocations. *Id.*

The meaning of the word total makes it clear load allocations are not meant to be relied on in Total Maximum Daily Load. Our opponents argue that the meaning of the word "total" is ambiguous and can have multiple meanings, however, it clear Congress intended total to mean its straight forward definition of a single numerical amount. *Am. Farm Bureau Fedn. v. U.S. E.P.A.*, 792 F.3d 281, 317 (3d Cir. 2015*).* Load allocations cannot be scientifically calculated because they come nonpoint sources and are difficult to be tracked. *Id.* Therefore, it is impossible to include Waste Allocations in Total Maximum Daily Loads and so it is unambiguous that Congress did not intend the EPA to rely on Waste Allocations. *Id.*

Congress has directly spoken on the issue; therefore, there was not a direct delegation of authority and *Chevron* deference does not apply. When *Chevron* deference does not apply, less regard is given to agency decisions, and strict scrutiny applies.

2. *Chevron* Step Two

If given *Chevron* deference the EPAs decision is still invalid because it is not a permissible construction of the statute. When a decision is given *Chevron* deference it is not valid if it is arbitrary, capricious or is contrary to the statute. *Chevron,* U.S. at 837. A statute is arbitrary and capricious when it is an abuse of discretion or the agency's interpretation of the

statute is not permissible. *Id.* The interpretation of the statute is not permissible because it the EPA cannot control load allocations and they are not compatible with the definition of total.

Relying on Load Allocations is impermissible because the EPA has no ability to determine or control load allocations and therefore cannot rely on them. *Am. Farm Bureau Fedn.* at 317. The EPA cannot control load allocation because the Clean Water Act does not give the authority to do and because it does not determine best management practices. *Id.*

The Clean Water Act does not give the EPA the authority to control load allocations. *Id.* This is demonstrated by the fact the Clean Water Act (CWA) authorizes the EPA to establish a single total load for a particular pollutant but the EPA does not have the ability to dictate how the TMDL is achieved. Guidance for Water Quality-based Decisions: The TMDL Process, 440/4-91 Assessment and Watershed Protection Division E.P.A. Washington, D.C. 1, 15 (1991). The EPA has the ability to control Waste Load Allocations (WLAs) under the CWA through several permitting procedures. *Id.* However, the EPA does not have the ability to control Load Allocations (LAs) under the CWA. *Id.* The only federal controls on nonpoint sources are through the National Pollution Discharge Elimination Systems (NPDES) permitting process. *Am. Farm Bureau Fedn.* at 317. The National Pollution Discharge Elimination permitting process only affects a small amount of large load allocation polluters. *Id.* Allowing the EPA to regulate LAs under the CWA is against Congressional Policy because CWA does not authorize the EPA to allocate the total or how the total load is to be achieved. *Id.* If Congress had intended to allow the EPA to rely on Load Allocations in TMDLs it would have given them a better ability to control Load Allocations. *Id.* This demonstrates that relying on nonpoint pollution (LAs) reductions that the EPA does not have control over is an abuse of discretion. *Id.*

The EPA does not have the ability to control Best Management Practices. Guidance for Water Quality-based Decisions: The TMDL Process, 440/4-91 Assessment and Watershed Protection Division E.P.A. Washington, D.C. 1, 15 (1991). The reduction in nonpoint sources that the EPA is relying on in this case come from state Institute Best Management Practices (BMPs) that require local reductions in pollution. *Id.* These BMPs are only instituted by state governments and the EPA does not have control over them and so the EPA cannot rely on them. *Id.* As noted above, the EPA also cannot regulate load allocations outside of Best Management Practices either. *Id.* Because the EPA cannot control load allocations within or outside of best management practices it cannot rely on changes in load allocations to meet it must achieve its TMDL goals. *Id.* It is unreasonable to rely on reductions in load allocations made from best management practices that the EPA cannot control; therefore, the EPA's decision to rely on those reductions when lowering the stringency of waste load allocations in this case was also unreasonable.

The meaning of the word total makes it clear load allocations cannot be relied on in Total Maximum Daily Load. The meaning of clear. *Am. Farm Bureau Fed'n.* at 317. Load allocations cannot be scientifically calculated because they come from nonpoint sources and are difficult to track. *Id.* Since the Clean Water Act requires a specific mathematical total of the pollutant but cannot create a mathematical total for the load allocations than the load allocations cannot be used to calculate the total maximum daily load. *Id.* Since it is too difficult to affectively measure or use load allocations in total maximum daily loads it is unreasonable to rely on load allocations. *Id.*

For the reasons state above, Lake watch requests the court reverses the lower court's decision to grant summary judgement in favor of the EPA because it is unreasonably relying on

load allocation reductions create by best management plans when lowering the stringency of total maximum daily loads.

CONCLUSION

Based on the foregoing reasoning, we respectfully request the Court to affirm in part the judgement of the district court in regards to these matters. First, the district court was correct in determining that the implementation of the Chesaplain Lake Watershed plan is ripe for judicial review. Second, the district court erroneously decided that the EPA's definition of total maximum daily load was contrary to law. Third, the district court correctly decided that a total annual pollution load, to be phased in over the course of five years, violates the Clean Water Act. Fourth, the district court incorrectly decided that the EPA's decision to reduce the stringency of waste load allocations for point sources for the implementation of the Lake Chesaplain TMDL was not arbitrary and capricious because of a lack of assurance of BMP implementation. Accordingly, we ask the court to affirm the decisions in regard to arguments 1 and 3, and reject the district court decision in regards to arguments 2 and 4 in favor of summary judgement.