United States Environmental Protection Agency

CASES

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union Island exercised federal question jurisdiction over the' claims in the instant case under 28 U.S.C. § 1331 and jurisdiction for the Clean Water Act (CWA) claims under 33 U.S.C § 1251. The District Court entered its judgement on August 15, 2021. The United States Environmental Protection Agency (EPA), Chesaplain Lake Watch (CLW), and the State of New Union (SNU), each filed a timely notice of appeal. Fed. R. App. 4(a).

ISSUES

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

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

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

IV. Is EPA's discretionary 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

The plaintiffs here, Chesaplain Lake Watch (CLW) and the State of New Union (SNU), brought this action against the defendant, the United States Environmental Protection Agency, alleging that the EPA erred in various aspects of the agency's determination to reject the proposed Total Maximum Daily Load (TMDL) for phosphorus loadings in the Lake Chesaplain watershed and to substitute instead another TMDL of its own design under the CWA. Record Transcript (RT) 4-5. CLW aims to have the substituted TMDL by the EPA declared inadequate, and CLW aims to have that substituted TMDL declared arbitrary, capricious, and unsupported by the data. RT 5. SNU aims to have EPA's rejection of SNU's TMDL and the regulations that informed EPA's decision declared invalid. *Id*. In the

District Court's mixed ruling EPA's rejection of SNU's TMDL was vacated and granted and denied parts of EPA's and CLW's motions for summary judgement. *Id*.

STATEMENT OF THE FACTS

Mats of algae, unclear waters, and offensive odors currently plagues Lake Chesaplain. (RT 7). Lake Chesaplain had once sustained excellent and the highest water quality. Its clear waters attracted recreational boaters and fishers from the entire mid-north region of the country, as well as supporting the vacation communities on the east shore. (RT 7). Yet, Lake Chesaplain, now, suffers from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. (RT 8). The State of New Union's Chesaplain Commission concluded that the excessive algae growth was caused by excessive amounts of phosphorus. (RT 8). The phosphorus level currently present at 0.034 mg/l went above the 0.014 mg/l standard. (RT 8). New Union Division of Fisheries and Environmental Control ("DOEFC"), following their triennial WQS review, included Lake Chesaplain on its impaired waters list that was submitted to the EPA in 2014. (RT 8). The DOEFC did not, however, submit a "Total Maximum Daily Load" ("TMDL") for Lake Chesaplain in its list of impaired waters. (RT 8) This case involves a dispute around that TMDL both in form and function as adopted by the Environmental Protection Agency ("EPA") and contested by the State of New Union and Chesaplain Lake Watch.

Although DOEFC did not submit a TMDL, the EPA did not object to the §303(d) submission by New Union. (RT 8). This submission includes Lake Chesaplain in its list of impaired waters. (RT 8). The year long delay in submitting a TMDL triggered Chesaplain Lake Watch ("CLW") to serve notice on both New Union and EPA. (RT 8). The CLW agreed to refrain from suing unless New Union failed to conduct a TMDL rulemaking. (RT 8). The DOEFC commenced a state rulemaking proceeding to establish a TMDL. (RT 8). In July 2016, Chesaplain Commission issued a supplemental report ("Chesaplain Supplemental Report"). (RT 8). The Chesaplain Supplemental Report calculated the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard and identified the existing sources of phosphorus inputs. (RT 8).

Ten large-scale hog production facilities, also known as concentrated animal feeding operations (CAFOs), inhabit the Union River watershed that flows into Lake Chesaplain. (RT 7).

The hog CAFOs are not subject to Clean Water Act ("CWA") permits because although CAFOs are included in the definition of "point source" under the CWA, 33 U.S.C. § 1362(14) they are considered to be "non-discharging." (RT 7). The hog CAFOs, however, are regulated and subject to permits by a State of New Union

statute. (RT 7). The Chesaplain Supplemental Report, here, determined that the hog controlled animal feeding operation contributed substantial phosphorus loadings to the Lake Chesaplain watershed, despite their status as "non-discharging" CAFOs. (RT 9). A substantial portion of their manure eventually reached the lake through the groundwater flows and surface runoff. (RT 9).

At the north end of the lake in the city of Chesaplain Mills lies a large-scale slaughterhouse that services the hog production facilities. (RT 7). The slaughterhouse has a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit issued by New Union for a direct discharge into the Union River. (RT 7). Chesaplain Mills also has a publicly owned sewage treatment plant ("STP") which discharges directly into Lake Cheasaplain, as regulated by a CWA point service permit. (RT 7). Additionally, recent home development on Lake Chesaplain shoreline are largely serviced by a septic system not subject to CWA point service permits. (RT 7). The Chesaplain Supplemental Report found that those private spectic systems contributed a substantial amount of phosphorus that reached Lake Chesaplain even though these sources are exempt from CWA permitting as discharges to groundwater rather than surface water. (RT 9).

Both point sources in the Chesaplain Watershed have no phosphorus permit restrictions, nor did the EPA's technology-based effluent limiting standards. (RT 9). Furthermore, the slaughterhouse's NPDES permit expired in November 2018 and has not been renewed. (RT 10). The Chesaplain Mills sewage treatment plant's NPDES permit also expired in February 2018. (RT 10). Both facilities are still operating on expired licenses that were administratively renewed due to timely renewal applications. (RT 10). Neither facility is currently subject to phosphorus discharge limits. (RT 10). DOFEC suggested modifying each permit to reflect a 35% annual phosphorus loading decrease phased in over five years, however both facilities requested administrative hearings due to the cost of compliance.(RT 10).

In October 2017, DOFEC proposed reducing phosphorus emissions from both point sources and nonpoint sources equally over time. (RT 9). This reduction was intended to be phased in over five years, with a 7% reduction in the first year, a 14% reduction in the second, a 21% reduction in the third, a 28% reduction in the fourth, and a 35% reduction in the fifth. (RT 9). Nonpoint source reductions would be achieved through a series of BMP initiatives aimed to encourage hog CAFOs and other agricultural sources. (RT 9). Proposed BMPs for agricultural sources included modifying animal diet to minimize phosphorus in manure, treating waste streams physically and chemically, and restricting manure spreading during frozen or saturated soil conditions. (RT 9). Private septic systems

were proposed to have greater inspection and pumping schedules. (RT 9).

However, DOFEC's plan to demand a 35 percent yearly reduction in CAFO, other agricultural, home septic system, and point source emissions was very contentious. (RT 9). Lakefront property owners protested about the high cost of septic tank upkeep and pumping. (RT 9). This would need an expensive phosphorus treatment system, which the slaughterhouse and Chesaplain Mills opposed. (RT 9). Chesaplain Lake Watch argued that the planned BMPs for manure spreading, other agricultural practices, and septic tanks were insufficient to achieve a 35% decrease in nonpoint source phosphorus. (RT 9). The statutory power to enforce such BMPs against agricultural sources. (RT 10). Chesaplain Lake Watch required that zero phosphorus be discharged from the two identified point sources to meet the 63 mt yearly decrease. (RT 10). Moreover, Chesaplain Lake Watch stated that a 35 percent yearly decrease conflicted with the CWA's mandate for a TMDL, which is a daily limit based on scientific computation. (RT 10). The Hog CAFOs contended to DOFEC that EPA lacked statutory power to mandate implementation of loading limitations against nonpoint sources. (RT 10).

To end up with a TMDL that had no wasteload or load allocations, DOFEC endorsed the Hog CAFO's stance in July 2018. (RT 10). EPA rejected the July 2018 TMDL and, after notice and comment, adopted the original DOFEC TMDL proposal in May 2019, which calls for a 35% reduction in annual phosphorus discharges from point and nonpoint sources over five years, with permit controls for point sources and BMP requirements for nonpoint sources. (RT 10). The Chesaplain Watershed Implementation Plan combines progressive point source limitations with BMP interventions (CWIP). (RT 10). The CWIP made no mention of enforcing the recommended BMPs. (RT 10). All scientific papers and public comments submitted to the DOFEC were integrated by EPA. (RT 10).

Since the EPA adopted the Lake Chesaplain TMDL, New Union has not required nonpoint sources in the Lake Chesaplain watershed to reduce phosphorus. The CWIP's phosphorus reduction methods have not been included in the state-issued nutrient management licenses for hog CAFOs. Lake Chesaplain waters continue to pollute.

On January 14, 2020, New Union filed action No. 66-CV-2020. Action 73-CV-2020 filed by Chesaplain Lake Watch on February 15, 2020. (RT 10). Both lawsuits are taken under the APA 702 judicial review provisions, and this court has jurisdiction under 28 U.S.C. 1331. (RT 10) On March 22, 2020, the United States District Court for the District of New Union requests to combine, and EPA filed the administrative record on July 1, 2020. (RT 10). The district court denied EPA’s motion for summary judgment in part, granted CLW’s motion for summary judgment in part, and granted New Union’s

motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL. (RT 5).

Residents of the Lake Chesaplain area who enjoy swimming, boating, and fishing are members of Chesaplain Lake Watch, according to affidavits filed with its summary judgment request. (RT 10). The affidavits also show that the reduction in Lake Chesaplain water quality has hampered these members' enjoyment of these activities. (RT 10). The EPA timely files a Notice of Appeal.

SUMMARY OF THE ARGUMENT

This Appellate Court should reverse and find the issues unripe. In the alternative, this appellate court should reverse and remand: (1) The District Court's order vacating EPA's rejection of New Union's phosphorus for the Lake Chesaplain Watershed and the vacation of its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and (2) The District Court's determination that the EPA's implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C.§ 1313(d).

First, these challenges to EPA's approval of the TMDL are not ripe. TDMLs do not self-execute and do not place legal obligations on polluters. Less pollutant load reductions are necessary to bring a contaminated water into compliance. Effluent limits in NPDES permits reduce pollutant loading from point sources. However, until the TMDLs are enforced, New Union has not presented documentation of any actual or threatened enforcement action. Lastly, a state's issuance of a NPDES permit does not constitute a final agency decision. Only final agency decisions are subject to judicial review. Any action brought against an agency that is not the agencies final decision is unripe. State NPDES permits still need to be reviewed and approved by the EPA. Moreover, the EPA can issue and administer their own NPDES permits. Thus, Chesaplain Lake Watch and New Union will not suffer any immediate hardship if judicial review is withheld.

Second, the EPA's interpretation of that the total maximum daily load includes waste load allocation and load allocation is permissible. Under the Chevron framework, the interpretation is permitted because "total maximum daily load" is reasonably ambiguous. Multiple plain meanings of the words in the TMDL as defined by other courts aren't congruous to the whole meaning. Moreover, a reading of the statute doesn't lend itself equally to the meaning of those words as stated in the TMDL's respective section. For example, the word total throughout the statute can be defined as either the sum of its constituent elements or the sum of a quantifiable amount. Given the ambiguity, this Court, under a Chevron step two analysis, should

apply the court's reasoning in *American Farm Bureau Federation* to allow deference to the EPA's interpretation of the TMDL.

Third, the caselaw tends to suggest that the EPA's rejection of SNU's TMDL and subsequent substitution of a TMDL of its own is no violation of the CWA. It is statutorily required for the EPA to make these determinations. 40 C.F.R. § 131.5. The CWA gives the EPA discretion when making these determinations because it is the job of the EPA to approve or disapprove the proposed TMDL. *Id*.

The Chevron Doctrine principle is an applicable doctrine of administrative law here. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 301 F.Supp.3rd 133, 140 (2018). The Doctrine entails a two-step process. First, Courts first ask if the Congress has spoken on the matter at hand, and if the Congress has, the intent of the Congress is decisive, and the matter is settled with no need to go to step two. *Id.* In step two, on the other hand, if the Congress is silent on the matter, Courts ask if the construction of the agency is permissible, and if it is, then the courts defer to the construction of the agency. *Id.* Here, the congress has spoken clearly on the matter a of the EPA's discretion when approving or disapproving TMDLs and even if the Congress was not explicit, the EPA has made a permissible construction in this case.

The CWA is explicit on the TMDL requirement of a daily load. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C.Cir.2006). Yet, since the *Friends of the Earth* decision, even the D.C. Circuit has permitted the EPA to issue total maximum annual or seasonal loads when those timeframes were deemed more appropriate by the agency. *American Farm Bureau Federation v. U.S.E.P.A*., 792 F.3d 281, 296 (3rd Cir. 2015).

Opposing counsel would here like to define the EPA's TMDL a "Phased TMDL." This characterization, however, is not only inaccurate—it tends to mislead. EPA guidance recommends phased TMDLs at times when there is limited data in an effort to gain greater knowledge for the next phase. *Clarification Regarding "Phased" Total Maximum Daily Loads*, August 2, 2006, *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2006_08_08_tmdl_tmdl_clarification_letter.pdf (last visited November 17, 2021). As such, there is the suggestion of a work-in-progress with phased TMDLs. Here, however, there is an abundance of data. (RT 8-9). Since the goal of the TMDL in the instant case is not merely to gather more data, and since it is not anticipated that the TDML will require more adjustments, the TMDL is most aptly characterized as a "Staged Implementation" which does not require any significant adjustments. As such, there is the suggestion of a firm decision reached from sufficient data.

Finally, the EPA was neither arbitrary nor capricious nor abusing its discretion in approving allocations of wasteload credits because the

"TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i).

STANDARD OF REVIEW

The standard in this case is de novo because, here, the summary judgement of the district court is reviewed. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1130 (9th Cir. 2002). Little to no deference needs to be paid to the determinations reached by District Court. *See Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939, 945 (D.C. Cir. 2013).

ARGUMENT

I. THE CHALLENGES TO THE LAKE CHESAPLAIN TMDL ARE UNRIPE FOR JUDICAL REVIEW

a. Chesaplain Lake Watch and the State of New Union Challenges Are Not Ripe.

In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardships to the parties of withholding court consideration. *Abbot Labs v. Gardner*, 287 U.S. 136, 149 (1967).

To address these issues, the Supreme Court identified three factors to consider:" (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n. Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

The EPA's approval of New Union TMDLs is not subject to review since the EPA's action has not yet been applied to Lake Chesaplain, and those TMDLs may never be utilized to amend the NPDES permits. If court review of EPA's approval decision is deferred until the New Union can identify the final TMDLs utilized to alter their permits, New Union will not experience considerable hardship. Delaying review would satisfy the ripeness doctrine's primary objective of avoiding entanglements in abstract issues until an administrative decision has had actual repercussions on the complaining parties. *Abbot Labs.,* 387 U.S. at 148-49.

b. Chesaplain Lake Watch and New Union Will Not Suffer Immediate Hardship If Review Is Withheld.

Delaying EPA's adoption of the State TMDL for Lake Chesaplain would not cause immediate hardship. To meet the hardship requirement, courts look to whether the challenged actions "command anyone to do anything or to refrain from doing anything," "subject anyone to any civil or criminal liability," or create "legal rights or obligations." *Ohio Forestry Ass'n Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998). Moreover, the EPA's certification of the New Union TMDLs imposes no immediate requirements or changes in the Chesaplain Lake Watch actions. Judicial review of EPA's approval decision is premature and would entangle the Court in precisely the sort of "abstract disagreements over administrative policies" that the ripeness doctrine, seeks to avoid. *Ohio Forestry Ass'n*, 523 U.S. at 732-33.

TMDLs do not impose legal requirements or bans on polluters and are not self-executing. *Prosolino v. Nastri*, 291 F.3d 1123, (9th Cir. 2001). Rather, TMDLs determine the pollutant load reductions required to bring a polluted water back into compliance. Reduced pollutant loading from point sources is accomplished by effluent restrictions in NPDES permits. However, New Union has not provided proof of any real or threatened enforcement action because such a cause of action cannot exist until the TMDLs are implemented.

The Chesaplain Lake Watch attack on the EPA's approval of the New Union TMDL is premature since it questions future loading reductions. *See Association of Am Railroads v. Surface Transp. Bd.*, 146 F.3d 942, 946 (D.C. Cir. 1998). Similarly, the Supreme Court addressed a challenge to a national forest's land resource and management plan. *Ohio Forestry Ass'n. Inc. v. Sierra Club*, 523 U.S. 726 (1998). In "an extensive, technically based plan, which forecasts outcomes that may affect many distinct parcels of land in a variety of ways and which themselves may alter over time," the forest plan did not approve logging. *Id.* at 736. Comparably, TMDLs calculate pollutant loading but do not enforce pollutant discharge limitations. For the reason set out above, judicial intervention is inappropriate and the parties suffer no hardship.

c. The Issues Are Not Fit for Judicial Review Under the APA.

In general, judicial review is appropriate when the concerns are solely legal and the challenge is to a final administrative action. *Abbot Labs*, 387 U.S. at 149. However, courts are pragmatic in their approach to "fitness for review," and there are times when a legal challenge to a final agency decision is not ripe. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967); *Lujan v. National Wildlife*

Federation, 497 U.S. 871, 891 (1990).[1] Neither Chesaplain Lake Watch nor New Union are impacted by the EPA's approval of the TMDL.

Moreover, A state's issuance of a NPDES permit based on the adopted TMDL is not a final agency decision. The EPA can issue permits and administer their own NPDES permit programs. § 1342(a) -(b). States must notify the EPA when they intend to issue a permit. §1342(d)(1). If the EPA objects that the permit is "outside the guidelines and requirements" of the Act, "[n]o permit shall issue." § 1342(d)(2) *See* 40 C.F.R. § 123.44 ("EPA review of and objections to State permits"). In *Champion International Corporation*, the court held that when EPA files an objection for a state permit and then assumes NPDES issuing authority, EPA has not reached a final agency action subject to judicial review. *Champion Intern. Corp. v. U.S.E.P.A.,* 850 F.2d 182, 186 (4th Cir. 1988). *See also* 33 U.S.C. § 1342 (d)(4) [2] The court explained that prior to the 1972 amendments to the CWA, the EPA did not vigorously assure uniformity and consistency of permit requirements. *Id.* at 186. Thus, the court concluded that the EPA was acting the way Congress intended it to when the EPA Administrator and the State reached an impasse over the issuance of a permit. *Id.* at 187.And any litigation over the degree of effluent reduction required for a source should take place in context of judicial review of the permit rather than in the context of an enforcement action. *Id.*

The State TMDL that contemplates NPDES imposes are unfit for judicial review. NPDES permits for municipal sewage discharge and concentrated animal feeding operations (CAFO) require best management practices (BMP). § 1342 (p)(3); 40 CFR § 412.4 (c). Here, the "Chesaplain Watershed Implementation Plan" (CWIP), which incorporates the State TMDL, does not specify whether or how the proposed BMP measures would be enforced. (RT 10). Further, New Union has taken no steps to require phosphorous reduction BMP by nonpoint sources in the Lake Chesaplain Watershed. (RT 10). The

[1] Regulation not ripe for APA review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

[2] In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

state-issued nutrient management permits for the hog CAFOs, additionally, have not been modified to incorporate any phosphorus reduction measures set out by the CWIP. (RT 10). If the State were to issue a permit on these circumstances, the EPA would have no other option but to object to permit issuance for being "outside the guidelines and requirements." Furthermore, the EPA can continue administrative process and ultimately issue a permit. The EPA's objection and issuing authority are not final actions subject to judicial review under the administrative finality discussed in Abbott. *Abbot* at 136.

II. The Inclusion of Waste Load Allocation and Load Allocation in the TMDL Is Not Contrary to Law Because of the Statutory Structure and Language.

a. The Term "Total Maximum Daily Load" is Ambiguous Under Chevron Step One to Allow for the EPA's Permissible Interpretation at Chevron Step Two.

The standard two-step Chevron framework gives respect to an agency's interpretation of legislation it administers. First, the Court considers whether Congress has explicitly addressed the problem. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984). If so, the Court, like the agency, must give effect to the unmistakably declared intent of Congress. *Id.* at 842-43. If the statute is ambiguous, the agency's interpretation must be based on an permissible construction of the statute. *Id.* at 843. Unless plainly erroneous or inconsistent with the regulation an agency's interpretation of its own regulations is deferable. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The statute text and case law is ambiguous to the plain meaning of "total maximum daily load." A permissible construction should be given to the EPA's inclusion of waste load allocation and load allocation, as a result.

b. Caselaw Does Not Provide a Harmonious Definition of "Total Maximum Daily Load" Based on the Individualized Definition That Varying Courts Brings to Those Words.

The words total, maximum, daily, and load are subject to multiple meanings in the case law that conflict with one another. In *Natural Resources Defense Council*, the court defined the word "maximum," as defined in Webster's Third New International Dictionary, as the

upper limit allowed by law or authority" or "the greatest quantity or value attainable in a given case." *Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency,* 301 F. Supp. 3d 133, 141 (D.D.C. 2018) Similarly, the court in Friends of Earth was also set on the Webster's definition of "daily" to mean "everyday." *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 144 (D.C. Cir. 2006). While the court in *American Farm Bureau Federation* believed, albeit acknowledging different interpretations, that total was to mean the sum of the constituent parts of the load. Taken together the individualized definition of each of those words would admit a construction that would be far from a plain meaning to be comprehensive to a plain reader. Thus, the term "total maximum daily load" would provide enough ambiguity under Chevron Step One.

c. The Statutory Texts of the Words of Total Maximum Daily Load Are Not Discernible When Construing Statute as a Whole.

Statutory construction is a "holistic endeavor." *United Savings Assn. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988). A provision that appears ambiguous on its own is frequently clarified by the rest of the statutory scheme, either because the same terminology is used elsewhere in a context that clarifies its meaning or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. *Id.* This is not the case here.

The words total, maximum, daily, and load have different meanings throughout the statute. Foremost, total maximum daily load isn't clearly defined in the statute. Second, "total" has different meaning in the statute as a whole. "Total" either means the total quantifiable amount or the sum of its constituent elements. *See* § 203(a)(3) ("In the case of a treatment works that has an estimated total cost of $8,000,000 or less); *But cf.* §204(b)(1) ("taking into account total wastewater loading of such works, the constituent elements of the wastes, and other appropriate factors."). Likewise, "maximum" gives way to multiple meanings in context to other sections of the statute. Maximum means either an amount, extent or scope, or limit. A maximum amount can be established by a maximum grant. *See* § 314(c). Maximum can also mean maximum limit. *See also* §311(q). Or "maximum extent practical" as stated in numerous sections of the statute. *Compare* § 402(5)(B). Furthermore, daily is hardly referenced except in the context of "maximum daily load" in the statute. The multiple meanings of those terms spread out in the statute is further evidence of the texts ambiguity to advance under Chevron step two.

d. Giving Agency Deference Allows a Permissible Construction of the Inclusion of the Waste-Load

Allocation and Load Allocation in the TMDL.

A permissible construction of the statute allows for the inclusion of a waste-load allocation and load allocation in the TMDL as interpreted by the EPA. 40 C.F.R. § 130.2(i)

The inclusion of "other wasteload allocation" in § 1313(d)(4)(A) admits an incorporation of wasteload allocation and load allocation into the TMDL definition. *Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency*, 792 F.3d 281 (3d Cir. 2015). In *American Farm Bureau Federation*, the court, under a Chevron step two analysis, found the agency made a "reasonable policy choice" in in its interpretation of the total maximum daily load. Analyzing the legislative history, the court there concluded that the post-enactment development, specifically in 1987, inclusion of the clause "other waste load allocation" in § 303(d)(4)(A) suggested that a TMDL contain a waste load allocation. *Id.* at 308. This Court reasoning may fall along similarly just as *American Farm Bureau Federation* court to give a favorable deference to the EPA's interpretation of the TMDL.

III. CASELAW SUGGESTS THAT THE EPA's TMDL IS NO VIOLATION

a. The CWA Gives the EPA Great Discretion in Supervising State TMDLs.

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To these ends, the EPA is relied on to, "among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources." *PUD No. 1 of Jefferson County v. Washington Dept of Ecology,* 511 U.S. at 704, 114 S.Ct. 1900 (citing 33 U.S.C. §§ 1311 & 1314). After the limitations are established, the CWA requires states to set water quality standards for interstate waters which are subject to EPA regulation. 40 C.F.R. § 131.5.

As such, the EPA requires the submissions to contain (a) the designated use of the body of water; (b) the methodology that informed the water quality standard revisions; (c) the water quality criteria which would suffice to protect the designated use; (d) an antidegradation policy consistent with 40 C.F.R. § 131.12 to maintain the quality of the body of water; (e) certification from the appropriate state authority that the body of water has been adequately maintained according to state law; and, (f) general information that would help the EPA in evaluating the scientific merits of the state's standards and information on policies that would affect the application and implementation of the standards. 40 C.F.R. § 131.6(a)-(f).

A state must submit to the EPA a biannual list documenting all bodies of water that fail to attain and are not expected to attain the water quality standards established under section 303 of the CWA. 40 C.F.R. §130.7(b)(3) & (d). These are known as 303(d) lists. "The inclusion of a water body on a State's 303(d) list triggers a statutory obligation to develop total maximum daily loads, or TMDLs, which specify the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011)(citing 33 U.S.C. § 1313(d)(1)(C)).

The EPA has discretion to either approve or disapprove the TMDL. 40 C.F.R. § 131.5. If the EPA approves of the TMDLs, the state is bound to fulfill its obligation according to the TMDL. If the TMDL is disapproved the EPA shall makes its own TMDL which will bind the state. *See Kingman Park Civic Association v. United States Environmental Protection Agency*, 84 F.Supp.2d 1, 2 (1999). If a state fails to submit a list, the EPA may deem this lack of a submission as constructive submission of a list with no TMDL. *Id. at* 5. The EPA has great discretion here.

When judging the TMDL decisions of the EPA, Courts apply the Chevron Doctrine, a principle of administrative law. The Chevron doctrine entails a two-step process. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 301 F.Supp.3rd 133, 140 (2018). Courts first ask if the Congress has spoken on the matter at hand, and if the Congress has, the intent of the Congress is decisive, and the matter is settled with no need to go to step two. *Id.* In step two, on the other hand, if the Congress is silent on the matter, Courts ask if the construction of the agency is permissible, and if it is, then the courts defer to the construction of the agency. *Id.*

Here, the congress has spoken clearly on the EPA's discretion when approving or disapproving TMDLs and even if the Congress was not explicit, the EPA has made a permissible construction in this case.

b. While CWA § 303(d) Requires a Daily Load, the Statute Is Silent on When Other Timeframes May Be More Appropriate, and Courts Have Held Timeframes Other Than Daily Permissible.

In *Friends of the Earth*, the D.C. Circuit held that the word "daily" is to be taken literally as used in the CWA. *Friends of Earth,* 144 (D.C.Cir.2006)("Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." *See Webster's Third New International Dictionary* 570 (1993)). But since *Friends of*

the Earth the D.C. Circuit has "allowed the EPA to issue total maximum annual or seasonal loads because… [the statute] is silent on whether another timeframe may be used when that would be more appropriate for the particular pollutant at issue." *American Farm Bureau Federation* at 296 (citing *Anacostia Riverkeeper,* 798 F.Supp.2d at 245).

A case in point is *Natural Resources Defense Council*. In NRDC, the court claimed that the controlling interpretation of the word "daily" in the CWA would be the interpretation given to the word by the earlier *Friends of the Earth* case. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 301 F.Supp.3rd 133, 141 (2018)("The D.C. Circuit's reasoning in *Friends of the Earth* is controlling here."). However, the court's reasoning was informed by its earlier decision in *Anacostia Riverkeeper.*

The *NRDC* challenged the decision of the EPA to have TMDLs that set a minimum amount of trash needed to be removed from the river rather than the maximum allowable amount of trash permitted to enter the river. This, so the argument went, was a brazen violation of the CWA and contrary to the agency's own regulations because "the agency's regulations define a waterbody's "loading capacity" as the "greatest amount of loading [i.e., introduction of a pollutant] that a water can receive without violating water quality standards." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 301 F.Supp.3rd 133, 137 (2018).

Yet, in *NRDC,* the court nowhere expressed a willingness to overturn its decision in *Anacostia Riverkeeper* which allowed for the addition of annual or seasonal timeframes so long as those timeframes are expressible in "daily" terms. Annual or seasonal are permissible because "the CWA's references to water quality standards require only that a TMDL set load levels 'necessary to attain and maintain applicable water quality standards,'" and " there is nothing incongruous about establishing daily pollutant load limits to meet water quality criteria expressed as another timeframe—such as a seasonal average—because the two issues involve different acts." *Anacostia Riverkeeper,* 798 F.Supp.2d at 245 (citing 33 U.S.C. § 1313(d)(1)(C)). The daily pollutant load limit sets the maximum amount of contaminant allowed to the enter the body of water and the seasonal or annual pollutant load limit expresses timeframe for the daily limit. *Id.* And other courts too have held that annual or seasonal load limits are permissible. *Natural Resources Defense Council, Inc. v Muszynski,* 268 F.3d 91 (2001) ("We also hold that the CWA does not require that all TMDLs be expressed strictly in terms of daily load.")(While the court in *Muszynski* also held that the EPA did not sufficiently explain why annual or seasonal loads were appropriate for measuring phosphorus, and remanded for the Agency to the better explain itself, the agency has since made available its technical

documents expounding on how timeframes other than daily are developed. *See* EPA, *Options for Expressing Daily Loads in TMDLs*, vii (2007)).

Further distinguishing *NRDC* from the instant case is that, in *NRDC*, the plaintiffs objected to the TMDL requiring that a certain amount of trash be removed from the Anacostia River rather than limiting the amount of trash allowed to be introduced into the river. *NRDC* at 139. In the instant case, however, the baseline limit on the amount of phosphorous allowed to be introduce into Lake Chesaplain is set at 180mt. (RT 9). The TMDL is then gradually reduced into a five-year so that the TMDL is set to 167.4mt on the first year after implementation, 154.8mt on the second, 142.2mt on the third, 129.6mt on the fourth, and 117mt on the fifth year. (RT 9). (And it is worth noting well that a TMDL set at 117mt is less than the annual maximum of 120mt offered in the alternative. RT 10.) While the TMDL in *NRDC* would permit more trash to accumulate in the Anacostia River as long as the required amount was removed, the TMDL in the instant case sets a firm maximum and reduces that maximum consistently until the waterway can maintain the desired chemical, physical, and biological equilibrium.

c. The TMDL Here Is a "Staged Implementation" TMDL Rather Than a "Phased" TMDL.

EPA guidance states that phased TMDLs "are appropriate in 'situations where limited existing data are used to develop a TMDL and the State believes that the use of additional data or data based on better analytical techniques would likely increase the accuracy of the TMDL load calculation and merit development of a second phase TMDL.'" US EPA, *Clarification Regarding "Phased" Total Maximum Daily Loads*, August 2, 2006, *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2006_08_08_tmdl_tmdl_clarification_letter.pdf (last visited November 17, 2021). Here, there is an abundance of data. (RT 8-9). On the other hand, staged implementations anticipate implementation in stages over a period of time and, because of the data quality, "it is anticipated that the load and wasteload allocations will not require any significant adjustments." *Id.* Since the goal of the TMDL is not merely to gather more data, and since it is not anticipated that the TDML will require more adjustments, the TMDL would be more aptly referred to as a staged implementation and not a phased TMDL. And the EPA, in its discretion as afforded by the express intent of the congress, found the staged implementation most suitable to achieve the desired chemical, physical, and biological equilibrium of Lake Chesaplain. 33 U.S.C. § 1314.

d. *Bethlehem Steel* Is Not Controlling and Even if It Were the EPA's Discretionary Act Cannot be Compelled.

Some courts have, in the past, found the July 1st, 1977, deadline mandatory. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3d Cir. 1976); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). However, Lake Chesaplain had excellent water quality a before the 21st century. (RT 7). The deadline applied before Lake Chsaplain ever required a TMDL. And even if the deadline were to somehow be retroactively applied, the EPA is not required to take enforcement action against all illegal discharges. *Bravo v. EPA*, 324 F.3d 1166, 1174 (10th Cir. 2003).

IV. EPA WAS NEITHER ARBITRARY NOR CAPRICIOUS NOR ABUSING ITS DISCRETION IN APPROVING ALLOCATIONS OF WASTELOAD CREDITS.

a. The District Court Is Correct in Concluding That EPA's Allocation of Wasteload Credits for Nonpoint Best Management Practice Is Permissible.

Courts may set aside any agency action, finding or conclusion that it holds to be unlawful if the action, finding or conclusion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Courts have "explained that EPA's reliance on either a model to predict pollutant measures or a substitute criterion is 'arbitrary and capricious' only where no 'rational relationship' exists between the two criteria or between a model and a criterion." *Sierra Club v. EPA,* 353 F.3d 976, 982 (D.C.Cir.2004); *Chemical Manufacturers Association v. Environmental Protection Agency*, 28 F.3d 1259, 1264 (D.C. Cir. 1994).

The District Court is correct in writing that courts "must not substitute its judgement for that of the agency." RT 15. (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). As the United States Supreme Court declared it is "not the function of the court to probe the mental processes" of the Secretary of a government agency. *Morgan v. United States*, 304 U.S. 1, 18 (1938). The *Morgan* case "clearly and unequivocally resolved that the courts had no authority to probe an administrator's understanding in the making of an adjudicatory decision," and *Overton Park* slightly narrowed the well-settled federal law to unless there is "a strong showing of bad

faith or improper behavior," or unless the adjudicatory decision is what Federal law would call an unlawful action, finding or conclusion that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* Gerald A. McDonough, *Administrative Law and Practice*, *Massachusetts Practice Series TM*, *Chapter 20*, § 20:42 (2021)(citing Morgan v. U.S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936); Morgan v. U.S., 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129, 1 Lab. Cas. (CCH) P 17033, 1 Lab. Cas. (CCH) P 17037 (1938); U.S. v. Morgan, 307 U.S. 183, 59 S. Ct. 795, 83 L. Ed. 1211 (1939); U.S. v. Morgan, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); See also generally 3 Kenneth Culp Davis, Administrative Law Treatise, § 17.7, pp. 299–301 (2d ed. 1980); Bernard Schwartz, Administrative Law, § 7.21, pp. 394–401 (2d ed. 1983); 5. U.S.C. § 706. Yet, here, the law is clear that "TMDL process provides for nonpoint source control tradeoffs" 40 C.F.R. § 130.2.

Courts may use an *Overton Park* inquiry when reviewing, under an arbitrary and capricious standard, if the agency failed to consider the relevant factors or made a clear error in its judgement. *Lakes Region Legal Defense Fund, Inc. v. Slater*, 986 F.Supp. 1169, 1200 (N.D. Iowa 1997); *Committee to Preserve Boomer Lake Park v. Department of Transportation*, 4 F.3d 1543, 1549 (10th Cir. 1993); *Prairie Band Pottawatomie Nation v. Federal Highway Administration*, 684 F.3d 1002 (10th Cir. 2012); *S.A. Healy Co. v. Metro. Sanitary Dist. of Greater Chicago*, 581 F. Supp. 654, 656 (N.D. Ill. 1984); *Checkosky v. S.E.C.,* 23 F.3d 452, 489 (D.C.Cir.1994); *Saratoga Dev. Corp. v. United States,* 21 F.3d 445, 458 (D.C.Cir.1994); *Grant v. Shalala,* 989 F.2d 1332, 1344 (3rd Cir.1993); *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.,* 940 F.2d 685, 698 (D.C.Cir.1991); *Community for Creative Nonviolence v. Lujan,* 908 F.2d 992, 997–98 (D.C.Cir.1990); *Lead Industries Ass'n v. Occupational Safety & Health Admin. .,* 610 F.2d 70, 86 (2d Cir.1979); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1383–84 (2d Cir.1977); *National Nutritional Foods Ass'n v. Matthews,* 557 F.2d 325, 331–32 (2d Cir.1977); *Montrose Chem. Corp. v. Train,* 491 F.2d 63, 68–69 (D.C.Cir.1974); *Hudson River Defense League v. Corps of Engineers,* 662 F.Supp. 179, 183 (S.D.N.Y.1987).

The Overton Park inquiry is a three-tier process which entails evaluating: (1) whether EPA acted within the scope of its authority; (2) whether EPA's decision was based on a consideration of the relevant factors; (3) whether the EPA followed the necessary procedural requirements. *S.A. Healy Co.* at 656; *Committee to Preserve Boomer Lake Park* at 1549.

Let's now apply the Overton Park inquiry here. First, the EPA, in its worthy goal of reducing phosphorus in the waterway, saw value in allocating TMDL credit in exchange for state Best Management

Practices that would prevent the seepage of phosphorus from nonpoint sources from entering the waterway. As for step one, the EPA is expressly authorized by the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §§ 1251(a) &(d). And the intent of the congress is clear that "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. *Thus, the TMDL process provides for nonpoint source control tradeoffs*." [emphasis added] 40 C.F.R. § 130.2(i). Here, the EPA was faced with a unique problem. The EPA is nowhere prohibited from incentivizing states to regulate nonpoint sources themselves through TMDL credits and the EPA does have authority to establish TMDLs through its discretion. 33 U.S.C. § 1313. As for step two, the relevant factors that EPA considered in making its decision are statutorily prescribed. 40 C.F.R. § 131.6(a)-(f). And, as for step three, in establishing the TMDLs the EPA followed the required procedure. 33 U.S.C. § 1313(d)(1)(C).

CONCLUSION

Upon the foregoing, the United States Environmental Protection Agency respectfully requests that this appellate court reverse and remand: (1) the district court's order vacating EPA's rejection of New Union's phosphorus for the Lake Chesaplain Watershed and the vacation of its regulatory definition of the term TMDL to include wasteload allocations and load allocations, and (2) the District Court's determination that the implementation of an annual percentage reduction TMDL was a violation of CWA § 303(d), 33 U.S.C.§ 1313(d).