C.A. No. 21-000123 CONSOLIDATED WITH C.A. No. 21-000124 Team 44

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,

Plaintiff-Appellee-Cross Appellant,

and

THE STATE OF NEW UNION,

Plaintiff-Appellee-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant

Appeal from an Order of the District of State of New Union

BRIEF OF APPELLEE THE STATE OF NEW UNION

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

Administrative and Executive Materials

Treatises

Other Authorities

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union ("District Court") had subject matter jurisdiction over the consolidated cases under 5 U.S.C. § 702 and 28 U.S.C. § 1331. This Court has jurisdiction of appeals from all final decisions of the District Court based upon 28 U.S.C. § 1291. The order denying summary judgment is usually considered an interlocutory order and not appealable. Roberts v. Universal Underwriters Ins. Co., 334 F.3d 505, 507 (6th Cir. 2003) (citing Phelps v. Coy, 286 F.3d 295, 298 (6th Cir. 2002), cert. denied, 537 U.S. 1104 (2003)). However, when the appeal from a district court's denial of summary judgment is presented together with an appeal from a grant of summary judgment, the Court of Appeals has jurisdiction to review the appropriateness of the district court's denial. Id. (quoting Thomas v. United States, 166 F.3d 825, 828 (6th Cir. 1999)).

The United States Court of Appeals for Twelfth Circuit has jurisdiction over this appeal because the appeal from the District Court's denial of summary judgment in the consolidated cases is presented with an appeal from a grant of summary judgment.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

A. 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?

Suggested Answer: Yes.

B. 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)?

Suggested Answer: No.

C. 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?

Suggested Answer: No.

D. 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?

Suggested Answer: No.

STATEMENT OF THE STANDARD OF REVIEW

Ripeness determination and a district court's grant or denial of summary judgment are reviewed *de novo*. See City of Kennett v. EPA, 887 F.3d 424, 430 (8th Cir. 2018) (citing Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 796 (8th Cir. 2016) (ripeness); First Dakota Nat'l Bank v. Eco Energy, 881 F.3d 615, 617 (8th Cir. 2018) (summary judgment)); Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281, 292 (3d Cir. 2015) (grant of summary judgment); Mueller v. Auker, 576 F.3d 979, 991 (9th Cir. 2009) (citing Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007) (denial of summary judgment)).

This Appeal involves the District Court's ripeness determination and grant and denial of summary judgment; thus, the proper standard of review is *de novo*.

STATEMENT OF THE CASE

Plaintiff, the State of New Union, filed action No. 66-CV-2000 against the United States Environmental Protection Agency ("EPA") on January 14, 2020, and Plaintiff Chesaplain Lake Watch ("CLW") filed action No. 73-CV-2020 against the EPA on February 2020. Record at 10. The District Court granted motions to consolidate the two actions on March 22, 2020, and the EPA lodged the administrative record with the District Court on July 1, 2020. Record at 10.

The State of New Union, challenged the EPA's rejection of its proposed TMDL consisting solely of the 120 mt/year total loading for the Lake Chesaplain watershed. Record at 11. New Union argues that it proposed TMDL satisfied all the requirements for a valid TMDL under the Clean Water Act and that the EPA's regulation, 40 C.F.R. § 130.2(i) that requires a state's TMDL submission include an allocation of the total maximum daily load between and among point, nonpoint, and natural sources, is contrary to law. Id.

Plaintiff CLW mounted two challenges to the EPA's adoption of the Cheaplain TMDL. Id. First, CLW argued that a TMDL consisting of an annual loading limit to be phased in over a period of five years is contrary to the legal requirements of the CWA. Id. Second, CLW challenged the WLA and LA adopted in the Chesaplain Watershed Implementation Plan ("CWIP") TMDL. Id. CLW argued that the EPA might not take any credit for phosphorus load allocation reductions anticipated from the implementation of BMPs for nonpoint sources where the EPA has no authority to require implementation of these BMPs, and there is no reasonable assurance the reductions will be achieved. Id.

The EPA disagreed with the merits of the claims of both plaintiffs, argued that its final Lake Chesaplain TMDL and CWIP are consistent with the requirements of the CWA and

adequately supported by scientific evidence in the record. Id. The EPA also argued that both complaints should be dismissed as lacking ripeness. Id.

The District Court denied the EPA's motion for summary judgment in part, granted CLW's motion for summary judgment in part, and granted the State of New Union's proposed TMDL for the Lake Chesaplain. Record at 5.

CLW appeals to the District Court's determinations that the EPA's credit for nonpoint pollution reductions to be achieved through the implementation of best management practices (BMPs) to make point source pollution reductions less stringent, was not arbitrary or capricious or an abuse of discretion based on the record before the EPA. Record at 4. However, we ask the court to affirm this determination, as BMPs to make point source pollution reduction was not arbitrary to law or capricious or an abuse of discretion.

The EPA appeals from the District Court's order vacating the EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed and vacating its regulatory definition of the term TMDL to include wasteload allocations and load allocations. Record at 4. However, the EPA violated its reasoned decision-making power when interpreting the gaps in text left open by Congress. Thus, the requirement to include wasteload allocations and load allocations violates the Clean Water Act and is contrary to law.

Following the issuance of an Order of the United States District Court for the District of New Union dated on August 15, 2021, the State of New Union filed a timely Notice of Appeal. Record at 2.

This Appeal followed.

STATEMENT OF FACTS

I. The Clean Water Act

The Clean Water Act ("CWA") is the primary federal law in the United States governing water pollution. Its objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In addition, the Act recognizes the responsibilities of the states in addressing pollution and provides assistance to states to do so, including funding for publicly owned treatment works for the improvement of wastewater treatment; and maintaining the integrity of wetlands. See generally the Clean Water Act, 33 U.S.C. § 1251 et seq. This regulatory program is based on cooperative federalism, which the federal Environmental Protection Agency ("EPA") establishes national standards that states are expected to implement through their own regulatory programs. States are expected to administer the permitting aspects of CWA and the water quality improvement aspects of the CWA.

CWA § 303(a) directs each state to adopt water quality standards ("WQS") for waters within the state. 33 U.S.C. § 1313(a). Section 303(c) directs states to review and revise these water quality standards routinely. 33 U.S.C. § 1313(c). A WQS consists of the designated uses for each waterbody and the water quality criteria necessary to support the designated use. 33 U.S.C. § 1313(c)(2)(A). Water quality criteria may take the form of numerical limits on pollutant concentrations in the water body, or narrative standards for aesthetic qualities and non-specific pollutants such as toxicity. See CWA § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.3(b).

States must perform an assessment of the ability of each water to meet standards following full implementation of the point source controls established by the Act. See CWA

§ 303(d), 33 U.S.C. § 1313(d). This section requires states to identify those water bodies that presently do not meet water quality standards. By regulation, EPA requires states to review and update their impaired waters list biennially. 40 C.F.R. § 130.7(d). The EPA has the authority to review and approve, or reject, a state's water quality standards process. The EPA reviews the designation of uses to the establishment of water quality criteria to the listing of impaired waters to the establishment of TMDLs for impaired waters. 33 U.S.C. § 1313(c)(3), (d)(2). If the EPA Administrator disapproves of the proposed WQS, list of impaired waters, or TMDLs, then EPA is directed to establish its own WQS, list, or TMDLs. This suit was brought by New Union as a means to compel the Court to find EPA's rejection of New Union's phosphorus TMDL for the Lake Chesaplain Watershed contrary to law.

II. Chesapeake Bay Total Maximum Daily Load ("TMDL")

In 2009, President Barack Obama directed the federal government to initiate efforts to restore and protect the Chesapeake Bay and its watershed. The President and the EPA determined that rapid action was necessary to preserve the Chesapeake Bay after numerous years of insufficient protection and preservation. See Chesapeake Bay Protection and Restoration, 74 Fed. Reg. 23,099, 23,100 (May 12, 2009). Outlined in the Executive Order, the President identifies the EPA as the lead agency for defining environmental goals for the Chesapeake Bay and describing the specific programs and strategies to be implemented to achieve preservation of the watershed and ecosystem of the Chesapeake Bay. Id. at 23,103. According to the EPA, most of the Chesapeake Bay is an impaired water body due to excess nitrogen, phosphorous, and sediment. Adam M. Teel, The Billion Dollar Decision: How the Third Circuit Expanded the Power of the EPA in Implementing Tmdls by Affirming Additional Mandates (Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3d Cir. 2015)), 55 Washburn L.J. 563, 576 (2016). As a result of the

immense pollution accumulating in the Chesapeake Bay, the EPA intervened and drafted a proposed Chesapeake Bay Total Maximum Daily Load ("TMDL"). Id. at 576, 577. A TMDL is the maximum amount of a pollutant, without violating the water quality standard, a body of water can lawfully receive. Id. at 546. The Chesapeake Bay TMDL is considered one of the most complex TMDLs in the nation, covering the entire watershed with ninety-two smaller TMDLs for individual tidal segments with their own stringent water quality standards. Id. As a result, the EPA's broad use of power through regulating the Bay and requiring more stringent criteria has led to disagreements and litigation by the Chesapeake Bay jurisdictions. This suit is one of many asserting that the EPA's exercise of discretion is contrary to law.

III. Current Litigious Climate of EPA's Decision-Making Power

There have been monumental cases that have tested the discretionary power of the EPA when it comes to regulating TMDLs. Explicit gaps left by Congress for an agency to fill are considered an expressly delegated power to the agency to promulgate necessary regulations, unless such regulations are contrary to the statute or are arbitrary and capricious. Statutory ambiguity or silence is also treated as empowering agencies to resolve the ambiguity or fill the gaps. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The Third Circuit and the Ninth Circuit have come out on opposite sides of what exactly the requisite discretionary power the EPA has when determining the text of the CWA. The Circuit found that because the CWA anticipated a partnership between states and the federal government, it provided an understanding that TMDLs are broad in their power, "includ[ing] allocations, target dates, and reasonable assurance." Am. Farm Bureau, 792 F.3d 281. Conversely, the Fifth Circuit found that when the EPA espouses inconsistencies, that stray from the standards set by Congress,

it has infringed its policymaking requirement of reasoned decision-making. Sw. Elec. Power Co. v. EPA, 920 F.3d 1003 (5th Cir. 2019).

We ask that the court reign in the EPA's discretionary power by ruling that the EPA's interpretation of the term Total Maximum Daily Load violated the Clean Water Act and that the EPA's adoption of credit for anticipated BMP pollution reductions was not arbitrary or capricious.

SUMMARY OF THE ARGUMENT

The protection of our Nation's waterways is a science. However, unlike the hard numbers of Mathematics or the Laws of Physics, the makeup and interactions of different chemicals and sediments in a body of water are far from an exact science. Rainfalls, dry spells, high winds, climate change, and human development are all factors that affect water composition at a level that cannot be reasonably ascertained on a rigid basis. State laws and Federal Agency oversight seek to establish a working level that protects the balance between nature and human co-existence. As it stands, the TMDL is simply that –a working-level measured through the scientific method and common sense.

While the statutory reading of the Clean Water Act may include inconsistencies and ambiguities, we implore The Court to strike a balance between the expert scientific minds within State and Federal Agencies, so that future generations may enjoy the unimpaired potential of Chesaplain Lake.

First, the District Court was correct in holding that the issues raised are ripe for adjudication. The issues fit judicial decisions because all of the facts necessary to adjudicate the claims have been developed and are part of the record before the EPA. Also, the delay of judicial review would impose hardship on the EPA and the State of New Union as well as residents of the State of New Union who are residing in the vincinity of Lake Chesaplain.

Next, the District Court was correct in granting Summary Judgment for New Union, and that the EPA's definition of the phrase "Total Maximum Daily Load" to require "WLA's" and "LA's" contradicts the plain meaning and intention of Congress in enacting CWA § 303(d), and EPA's regulation requiring such information as part of a TMDL is contrary to law.

The EPA attempts to take an affirmative step in regulation by inferring a strict definition of "total" in "total maximum daily load," specifically that New Union failed to include WLA's or LA's in its rejected phosphorus TMDL. This argument is flawed. The CWA does not insist that WLA's and LA's are required elements of a valid TMDL, nor does it provide for specific point-source allocations contained within the definitive construction of "Total." In the context of CWA § 303(d), total means total. The CWA does not require New Union to partition phosphorus source allocations, and it most certainly does not give the EPA permission to enforce unfounded WLA and LA maximums. The EPA exceeded its discretionary power pursuant to the CWA, and this Court should uphold the District Court's ruling that the EPA acted unlawfully in rejecting the New Union TMDL.

Although the EPA overstepped in its capacity to regulate WLA's and LA's, The EPA still retains the title as the foremost authority on water quality TMDL's. The District Court erred in its ruling that EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased in over five years violates the CWA § 303(d) requirements for a valid TMDL.

The CLW argues that by adopting a phased TMDL, EPA has not adopted a TMDL at the level necessary to assure achievement of water quality standards (at least until the reduction is fully phased in after five years), based on a provision that no schedules of compliance shall be implemented later than July 1, 1977. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). However, the overall purpose and structure of the Clean Water Act fully allow and anticipates the implementation of target dates and deadlines for water quality standards, as already adopted by the Third Circuit. The CWA is silent on how to account for sources, among many other considerations beyond the plain structure of The Act, making it fully reasonable to understand

the CWA as including TMDL target dates. Common sense and the complexity of the scientific method require that the EPA and the states promulgate effective TMDL's in consideration of a timeline and changes over time.

CLW also argues that The EPA violated the CWA in implementing an annual pollution maximum load, rather than a maximum load based on a plain text definition of "daily." However, deference should be given to the Agency's interpretation regarding an ambiguous term, if the term is reasonable. See Chevron, 467 U.S. at 842–43. The word "daily" in TMDL is used ambiguously because the statute gives no express provision for maximum load reduction timeframes, and it expands on other time-oriented terms such as "seasonal" and "variations." The EPA has the statutory authority to establish water body TMDL's and has done so in a way that encompasses reasonableness and the goals of New Union. Accordingly, it is consistent with the purpose of all parties that the EPA, as the leading scientific body on the subject, establish time requirements and modifications for a TMDL.

Finally, the District Court correctly rejected the CLW's reasonable assurance standard in determining whether the EPA's adoption of the BMP credit was arbitrary and capricious because the correct standard is *Chevron* deference. The EPA's determination to suggest nonpoint source BMP's as an offset to point source reductions passes Step One because the statute is ambiguous, and Congress intended for the EPA to fill the gap. The determination also passes Step Two because the EPA's interpretation furthers the CWA requirements and the goal of achieving water quality standards, and this interpretation is supported by legislative history of the Clean Water Act.

ARGUMENT

I. The District Court Correctly Found That the Cases Are Ripe for Judicial Review Because They Are Fit for Judicial Decision and the Hardship to the Parties Exists

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807–08 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–149 (1967)).

Whether administrative action is ripe for judicial review requires evaluation of "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Nat'l Park Hosp. Ass'n, 538 U.S. at 808 (citing Abbott Labs., 387 U.S. at 148–149). A pre-enforcement challenge to regulation is ripe where the issues presented are fit for judicial review, and hardship to the parties would result without hearing the suit. Am. Farm Bureau, 792 F.3d at 293 (citing Abbott Labs., 387 U.S. at 149).

Fitness for review primarily depends on whether a case would benefit from further factual development, and when a dispute involves the approval of a TMDL by the EPA, the fitness for review is hinged upon whether further factual development regarding the EPA's application of the TMDL would aid the court's decision. See City of Kennett, 887 F.3d at 433. When parties present a purely legal dispute on a well-developed record about the EPA's process of promulgating a TMDL, a pre-enforcement challenge to the EPA's TMDL is fit for judicial review. Am. Farm Bureau, 792 F.3d at 293.

"The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review." Iowa League of Cities v. EPA, 711 F.3d 844, 867 (8th Cir. 2013) (citing Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000)). Also, even though a TMDL has not been incorporated into a state's continuing planning process and enforced against individual members, those members of an association will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation, and hardship to those individuals would result. Am. Farm Bureau, 792 F.3d at 293. When the EPA and the state affected by the TMDL would spend a lot of resources regarding the dispute, hardship would be imposed on the EPA and the state. Id..

Here, as the District Court correctly pointed out, all of the facts necessary to adjudicate the claims have been developed and are part of the record before the EPA. Record at 12; see also Record at 7–10. Therefore, further factual development regarding the EPA's application of the TMDL would not aid the court's decision, and the issues are fit for judicial decision.

Furthermore, as the District Court correctly found, the Lake Chesaplain TMDL contemplates specific NPDES permit limits for the point sources discharges, and the State of New Union will be required to implement without delay. Record at 12. That would affect the activities of residents of the State of New Union living in the vicinity of Lake Chesaplain because those residents will have reason to limit their discharge of pollutants in anticipation of the TMDL's implementation, and hardship to those individuals would result, in turn, will result in hardship to the State of New Union. In addition, hardship would be imposed on the EPA and the State of New Union because the EPA and the State of New Union are spending spend a lot of resources regarding the dispute, including this appeal.

Therefore, the District Court correctly found that the cases are ripe for judicial review.

II. The EPA's Determination to Reject the New Union Chesaplain Watershed Phosphorus TMDL Is an Incorrect Interpretation of The Term "Total Maximum Daily Load"

A. The EPA's Definition of "Total Maximum Daily Load" is Contrary to Law and Public Policy

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

Strict construction requires the practice of interpreting a document or statute using only the words it contains. When the document or statute does not provide clarity, interpretation is deferred to the court. In Chevron, the Supreme Court held that when Congress explicitly allows a gap for the administrative agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Chevron, 467 U.S. at 843. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or contrary to the statute. Id. at 844. Under the Chevron framework for judicial review of an agency's interpretation of a statute, the reviewing court first conducts an independent review of the statute and its legislative history, and deference to the agency's interpretation is appropriate only when a court finds the statute to be ambiguous, in which case the court looks to whether the agency's construction of the statute is reasonable. Id. at 844–45. Since the EPA's definition of "total maximum daily load" is contrary to law and public policy goals, we agree that the court should not exceed further than the first Chevron step.

The Fifth Circuit arrived at a similar conclusion in Southwestern Electric Power Company v. United States Environmental Protection Agency when the EPA attempted to implement a final rule on the CWA's effluent limitation guidelines for steam-electric power plants. Sw. Elec. Power, 920 F.3d 1003. The final rule sets the best available technology economically achievable ("BAT") for leachate equal to the previous best practicable control technology currently available ("BPT") standard established in 1982. Id. at 1012. The agency offers two primary justifications for its decision not to regulate leachate with any of the more advanced control technologies now available. Id. at 1023. The rule asserts that leachate forms “a very small portion of the pollutants discharged collectively by all steam power plants.” Id. at 1032. The EPA reasons that, because the new BAT limits established for wastewater from other streams will substantially curtail total power plant pollution, the new rule “represents reasonable further progress toward the CWA's goals” even without establishing any stricter controls on leachate. Id. at 1012. However, Environmental Petitioners assert that the EPA's leachate rule conflates the BAT and BPT standards in a way not permitted by the statutory scheme. The EPA's decision to set impoundments as BAT for leachate fails the first Chevron step by violating the plain text and structure of the Clean Water Act. Id. at 1024. Further, petitioners claim that the agency arbitrarily set impoundments as BAT for leachate was an impermissible construction of the Act, which requires a BAT to eliminate discharges of "all pollutants" if "technologically and economically achievable." Id. For these reasons, environmental petitioners argued that the EPA's leachate rule disrupts the BAT and BPT standards in a way not permitted by the statutory scheme and was proposed without explanation. Id. Such a proposal is inconsistent with the Act's careful distinction between the two standards. A distinction that separates technology twenty years apart and rigorous standard that is required by the Act. Petitioners argue that the EPA’s choice of

inconsistency sacrifices more effective, achievable control technologies, which would, in turn, eliminate the discharge of all pollutants, particularly toxic pollutants. Id. at 1014. Since the Fifth Circuit found that the portions of the final rule regarding leachate were unlawful and were absent of the EPA's policymaking requirement of reasoned decision-making. Id. at 1033. The Court vacated the leachate portion of the rule.

B. The EPA Fails its Reasoned Decision Making Requirement in Regard to Discretionary Authority

Additionally, outlined by San Francisco Baykeeper, Inc. v. Browner, the CWA sets forth several elements required in a TMDL. San Francisco Baykeeper, Inc. v. Browner, 147 F. Supp. 2d 991, 1006 (N.D. Cal. 2001). The TMDL must 1) target a WQLS; 2) address a pollutant that has been identified by the EPA as suitable for TMDL calculation; 3) be created in accordance with California's section 303(d) list priorities; (4) contain a TMDL calculation; (5) contain a specific allocation of the WQLS's loading capacity; (6) contain a margin of safety; and (7) must account for seasonal variations. Id. These elements set the guidelines that agencies must follow when submitting TMDLs to the EPA. Thus, they should serve as a rubric to the EPA, requiring them to limit their discretion if all elements are duly satisfied.

The EPA exhibited inconsistencies when rejecting the New Union Chesaplain Watershed phosphorus TMDL on the grounds that the TMDL failed to include WLAs and LAs. The present case is similar to Southwestern Electric because the EPA oversteps its reasoned decision-making authority when defining guidelines for the CWA. The EPA’s purported definition of the phrase TMDL requires WLAs and LAs. The EPA's attempt to pronounce the mandatory allocation of pollution reductions among individual sources throughout a watershed is facsimile to the EPA's attempt to adopt a new definition for leachate regulation. Both discretionary decisions were

foundationless because they attempted to fill in a gap that was explicitly left vacant by Congress. In Southwestern Electric, the EPA attempted to minimize the standard the CWA requires for BATs to eliminate discharges of all pollutants if technologically and economically achievable. Sw. Elec. Power, 920 F.3d at 1024. The EPA did so by reverting the standards required to altering the standard for eliminating all pollutants, such as leachate. In the present case, the EPA attempts to take an affirmative step in regulation by inferring a strict definition of "total" in "total maximum daily load." The EPA rejected New Union's phosphorus TMDL because it did not include WLAs or LAs, a foundation absent in the CWA. According to CWA § 303(d), 33 U.S.C. § 1313(d), the word “total” in “total maximum daily load” does not provide for the construction that would require the total to include a specification of proposed components of the total, such as WLAs or LAs. And as reasoned by the District Court, the 303(d) definition of the total, simply means total. Thus, the EPA attempting to set standards upon which to reject states for their submissions of TMDLs is not only invalid but contrary to law as prescribed by Chevron.

When applied, the TMDL elemental test espoused by the Ninth Circuit in San Francisco Baykeeper, Inc. v. Browner, proves that the New Union Watershed phosphorus TMDL successfully met the requirements. San Francisco Baykeeper, 147 F. Supp. 2d at 1006. The first element is satisfied since Lake Chesaplain is designated as Class AA, the classification reserved for the highest quality waters in the state. The second element is satisfied since the EPA has identified phosphorus in water quality standards suitable for TMDL calculations. CWA § 301, 33 U.S.C. § 1311. The third element is satisfied since the New Union Chesaplain Watershed TMDL implement applicable water quality standards with seasonal variations and a margin of safety. A requirement outlined in California's section 3030(d) list priorities. The fourth element is satisfied since New Union accurately submitted the requisite TMDL calculation as shown in the record.

The fifth element is satisfied because the plain meaning of the CWA's "total" in total maximum daily load does not require load allocations. Sixth, since all TMDL calculations account for a margin of safety, New Union has impliedly satisfied this element. And the seventh element is present as the plain meaning of the rule allows seasonal to equate to "annual" as calculated by New Union's Chesaplain Watershed TMDL. Thus, New Unions Chesaplain Watershed phosphorus TMDL has duly satisfied the elements provided by the Ninth Circuit.

Since the EPA exceeded its discretionary power when requiring WLAs and LAs for acceptable TMDLs and the TMDL submitted satisfied all elements set forth by the Ninth Circuit, we ask this Court to find in favor of New Union. Our analysis further illuminates that the EPA unlawfully rejected the TMDL using an incorrect interpretation of the term "total maximum daily load."

III. The EPA Has the Authority to Implement Timeframes And Maximum Load Requirements Because of Their Statutory Authority to Do So, the Purpose Of the CWA, And Overall Common Sense

A. A Phased Implementation Plan for Tmdl's Fulfills the Overall Purpose of the Clean Water Act

The District Court erred in its determination that the EPA's adoption of a phased, five-year TMDL for the Lake Chesaplain Watershed violated the 1977 statutory deadline for schedules of compliance pursuant to CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

The overall purpose and structure of the Clean Water Act fully allow and anticipates the implementation of target dates and deadlines for water quality standards. Am. Farm Bureau, 792 F.3d 281.

Implementing phased TMDL's in order to achieve mandated water quality is not a novel issue, and implementation plans have already been decided in favor of the EPA. In *Farm Bureau*,

trade associations brought an action against the EPA challenging the EPA's TMDL regulations for nitrogen, phosphorus, and sediment that can be released into the Chesapeake Bay. The Court ruled in favor of the EPA and noted that the overall purpose of the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a)." See id. at 299 (quoting Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992)). Furthermore, it was emphasized that a TMDL is a broad goal with many considerations beyond the plain language of the text, and as such, it is fully reasonable to understand the CWA as including TMDL target dates, and that the CWA is silent on *how* to properly account for sources. Id. at 306.

The rationale of the Third Circuit Court was not based on a fleeting whim; it was firmly rooted in the policy that common sense and scientific minds shall determine the implementation of National water safety measures. See id. at 300 ("[i]t is common sense that a timeline complements the Clean Water Act's requirement . . . . the amount of acceptable pollution in a body of water is necessarily tied to the date at which the EPA and the states believe the water should meet its quality standard.") ("[P]romulgating an accurate TMDL—that is, one that states a pollutant load 'necessary to implement the applicable water quality standards,' 33 U.S.C. § 1313(d)(1)(C)—requires consideration of a timeline and of changes over time).
What further strengthens the notion that a timeline implementation is not only allowed but encouraged is the fact that in Am. Farm Bureau, the Trade Association themselves agreed that developing time-oriented implementation is a useful practice for TMDL's. See Am. Farm Bureau, 792 F.3d at 308.

Here, plaintiff Chesaplain Lake Watch rests their argument on a statutory provision that

implies a hard stoppage of all time-oriented TMDL implementations occurring after July 1, 1977. See CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). The Third Circuit has shown through their holding in Am. Farm Bureau that while this guideline may be in existence, it is not congruous with the basic notions of implementing applicable water standards and overall common sense.

There are extreme difficulties and logistics surrounding an en-masse phosphorus reduction. Residents of the watershed, businesses, agricultural operations, and tourism are all part of the overall scheme to reduce the pollutant in a region that undoubtedly produces tens of millions of dollars for both New Union and its citizens. To inhibit the required scientific method with ambiguous statutory text readings is not in accord with the overall goal of the CWA in making this Nation's most valuable resource safe for all.

B. An Annual Pollution Loading Reduction Does Not Violate the Requirements for A Valid TMDL And Recognizes the Authority Granted to the Environmental Protection Agency

The District Court erred in its determination that the EPA's adoption of a TMDL for the Lake Chesaplain Watershed consisting of an annual—and not daily—pollution loading reduction violated the CWA § 303(d) requirements for a valid TMDL.

Where a statute is ambiguous, and the EPA has acted within its delegated authority, deference to the Agency's interpretation should be made under a standard of reasonableness. See Chevron, 467 U.S. 837; Anacostia Riverkeeper, Inc. v. Jackson, 798 F. Supp. 2d 210 (D.D.C. 2011); Bluewater Network v. EPA, 370 F.3d 1 (D.D.C. 2004).

In Anacostia Riverkeeper, Inc. v. Jackson, the issue of interpreting "daily" was raised in full when several Environmental organizations brought an action under the CWA against the EPA. Anacostia Riverkeeper, 798 F. Supp. 2d 210. These organizations challenged The Agency's

approval of a pollution control plan for the Anacostia River, specifically the contention that a Total Maximum Daily Load requirement should be calculated as a maximum load per day and not a daily load based on overall seasonal load expectations. Id. at 246. The EPA rebutted the challenge, explaining that "the applicable criterion is not applied on a daily basis but rather on a seasonal basis. Therefore, the potential periodic daily high excursions of the water clarity criteria are not relevant to determining whether the TMDL's allocations are set at a level necessary to implement the applicable water quality standards expressed as a seasonal average." Id. at 247.

The Court ruled in favor of the EPA and their deference to the District of Columbia's seasonal requirement. Id. at 244 (stating that applicable daily TMDL criteria must not be achieved at all times and maybe periodically violated in a seasonal capacity).

Specifically, in Anacostia Riverkeeper, the court deferred to the EPA's interpretation of the CWA's instruction to develop TMDLs to implement "applicable water quality standards" pursuant to the language in 33 U.S.C. § 1313(d)(1)(C). See Anacostia Riverkeeper, 798 F. Supp. 2d at 246 (interpreted as requiring daily pollutant loads that will meet water quality standards in whatever timeframe applies to those standards under state law). At the time, D.C. law stated that the Secchi[1] criterion must be met on a seasonal segment average. Id. Tying the TMDL's requirements to the period set forth in a state's water quality standard is consistent with the CWA, its implementing regulations, and common sense. Id.

[1] Water transparency is measured with a Secchi depth disk. A Secchi disk is a metal disk, 8 inches in diameter that is lowered into the water on a cord. The depth that the Secchi disk can no longer be seen through the water is the Secchi depth. When the water transparency is high, the Secchi depth is high. When the water transparency is low and cloudy, the Secchi depth is low. Secci Depth, RMB Env't Lab'ys, Inc., https://www.rmbel.info/primer/secchi-depth/ (last visited Nov. 10, 2021).

In Bluewater Network v. EPA, the court again found that where the statute is ambiguous, and The EPA has acted within its delegated authority, the courts shall defer to the Agency's interpretation if it is reasonable. See Bluewater Network, 370 F.3d at 11 (citing Chevron, 467 U.S. 837). In Bluewater, the court had to determine the correct interpretation of Congress' ambiguous usage of the words "significant contribution," which controlled Carbon emission levels of vehicles under 42 U.S.C. § 7547(a)(1)–(4) (also referred to as §§ 213(a)(1), 213(a)(2), 213(a)(3), 213(a)(4)). Under § 213(a)(2), The EPA was to determine whether all new and existing nonroad vehicles are "significant contributors." However, the Court noted that other provisions existed in the same section that drew a distinction between the "significant contributor" finding required for all new and existing nonroad vehicles, and the "cause, or contribute" finding for other categories. See Bluewater Network, 370 F.3d at 13. The Court specified that the repeated use of the term "significant" to modify the contribution required for all nonroad vehicles, coupled with the omission of this modifier from other sections, indicates that Congress did not intend to require a finding of an explicit "significant contribution" for individual vehicle categories, and therefore the EPA's interpretation and subsequent carbon measurements were proper. Id. at 14.

Here, to end the dispute between the EPA and CLW, the first step in determining the interpretation of the word "daily" under the Bluewater framework is based on the "assumption that legislative purpose is expressed by the ordinary meaning of the words used." Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 149 (1984) (quoting Russello v. United States, 464 U.S. 16, 21 (1983)). The ordinary meaning of "daily" does not provide a concrete interpretation in support or against the EPA's reading, as "daily" most often means "occurring, made, or acted upon every

day."[2] However, the second definition in the dictionary is stated as "reckoned by the day, e.g., average daily wage."[3] This highlights the fact that the word "daily," while standing alone, can refer to the averaging of daily events as expressed ordinary meaning.

Again, the next step under a Bluewater Network framework is to see if other provisions in the same statute repeatedly reference a "daily" limit or other languages to assess congressional intent of the word and provision. For instance, section 33 U.S.C. § 1313(d)(1)(C) requires that "each state shall establish a total maximum daily load . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety . . . ." The next also states that "such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof . . . ." 33 U.S.C. § 1313(d)(1)(D).

In these two provisions of the CWA, the word "daily" is never again referenced other than its original usage in Total Maximum Daily Load. However, twice in the provision congress explicitly mentions that water standards need to be established with respect to seasonal variations and margins of safety. Seasonal, by modern definitions, means "varying in occurrence according to the season."[4] "Season," by all accounts, means the three-month intervals of Fall, Winter, Summer and Spring. "[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

[2] Daily, Merrian-Webster, https://www.merriam-webster.com/dictionary/daily (last visited Nov. 12, 2021).

[3] Id.

[4] Seasonal, Merrian-Webster, https://www.merriam-webster.com/dictionary/seasonal (last visited Nov. 12, 2021).

inclusion or exclusion." See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (quoting Russello, 464 U.S. at 23). Congress has repeatedly stated in these provisions that loads shall be established with deference towards seasonal, three-month variations and a margin of safety.

Seasons occur once a year. To apply a TMDL that effectively establishes the congressional intent of seasonal variations, an entire year would need to pass to establish all four seasons and their variations. It is entirely within reason and within the interpreted definitions of 33 U.S.C. § 1313 that the EPA's annual standard be implemented.

The Plaintiffs demand that TMDL be expressed as an average every single day is not only entirely unreasonable, but it also dismantles the authority and judgment granted to New Union and the EPA by the CWA to determine if water quality should be measured as daily, seasonal, or yearly maximums or averages.

The EPA has authority to review and approve (or reject) each step of the water quality standards process, …[including] the establishment of TMDLs for impaired waters. See 33 U.S.C. § 1313(c)(3), (d)(2). Before the EPA establishes a TMDL for a State, Each State shall establish a total maximum daily load for pollutants deemed unsafe. See 33 U.S.C. § 1313(d)(1)(C). The New Union Division of Fisheries and Environmental Control ("DOFEC") rightfully exercised its authority when it adopted a TMDL that consisted solely of a 120 mt annual maximum.[5] Record at 10. The DOFEC TMDL was established yearly, not daily.

[5] The DOFEC implemented the TMDL through an equal phased reduction in phosphorus discharges by both the point sources and the nonpoint sources. This reduction was proposed to be phased in over a period of five years – that is, a 7% reduction from the 180 mt baseline in the first year, a 14% reduction from the baseline in the second year, a 21% reduction from the baseline in the third year, a 28% reduction from the baseline in the fourth year, and a 35% reduction from the baseline by the fifth year.

The EPA rightfully exercised its own authority in adopting the DOFEC TMDL reduction requirement plan, which was predicated on the DOFEC provisions of annual limits. The EPA has shown that it was consistent in applying New Union law by applying the annual TMDL standard. As stated in Bluewater Network*:* "the Court will therefore defer to EPA's interpretation of the CWA's instruction to develop TMDLs to implement "applicable water quality standards," as requiring daily pollutant loads that will meet water quality standards in *whatever timeframe applies to those standards under state law*." Bluewater Network, 370 F.3d at 11. (emphasis added).

With the purposes of the CWA, New Union authority, and EPA authority in mind, it is consistent with the purpose of all parties that the EPA, as the leading scientific body on the subject, establish load requirements and modifications for a TMDL, rather than having a state and its citizens guess on the matter based on ambiguous statutory language.

IV. The District Court Correctly Found That the EPA's Adoption of the Bmp Credit Is Reasonable And Not Arbitrary And Capricious, Nor Abuse of Discretion

The District Court correctly rejected the CLW's reasonable assurance standard in determining whether the EPA's adoption of the BMP credit was arbitrary and capricious or abuse of discretion. Record at 15. Rather the proper standard of review is arbitrary and capricious standard—*Chevron* deference—and the EPA's determination to suggest nonpoint source BMP's as an offset to point source reductions is not arbitrary and capricious or an abuse of discretion.

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the

meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. When an agency's action is in dispute, the reviewing court shall hold the action unlawful and set aside when it found the action arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

When an agency's action is related to the interpretation of a statute, courts have applied *Chevron* framework considering the intent of Congress. See Chevron, 467 U.S. 837; City of Arlington v. FCC, 569 U.S. 290 (2013); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218 (2001).

Chevron is rooted in a background presumption of congressional intent that when Congress left ambiguity in a statute administered by an agency, the ambiguity would be resolved by the agency, and Congress desired the agency to possess whatever degree of discretion the ambiguity allows. City of Arlington, 569 U.S. at 296 (quoting Smiley v. Citibank (S. Dakota), N. A., 517 U.S. 735, 740–741 (1996)). Therefore, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." Id. (quoting AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397 (1999)) (alteration in original). When analyzing an agency's interpretation of a statute, courts apply the Chevron two-step framework. King v. Burwell, 576 U.S. 473, 485 (2015) (citing Chevron, 467 U.S. 837). Step One asks whether the statute is ambiguous and, if so, Step Two asks whether the agency's interpretation is reasonable. Id. (citing Chevron, 467 U.S. at 842–843). *Chevron* deference presumes that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. Id. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

A. *Chevron* Step One

As to *Chevron* Step One, the issue is whether adoption of a credit for anticipated BMP pollution reduction to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL is ambiguous in the CWA.

CWA § 303(d) requires each state to establish the TMDL at a level necessary to implement the applicable water quality standards but does not address whether anticipated BMP pollution reduction can make waste load allocations less stringent. See 33 U.S.C. § 1313(d). Concerning the promulgation of a TMDL, courts have recognized there are considerable gaps in the CWA, and the EPA has the authority to fill the gaps. Am. Farm Bureau, 792 F.3d at 296 (citing Pronsolino v. Nastri, 291 F.3d 1123, 1131 (9th Cir. 2002); Nat'l. Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 98–99 (2d Cir. 2001); Anacostia Riverkeeper, 798 F. Supp. 2d at 245).

However, the relevant regulation provides, "[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i) (alteration in original). Many courts have defined TMDLs to accord with the EPA's regulations. Am. Farm Bureau, 792 F.3d at 295–96 (citing Upper Blackstone Water Pollution Abatement Dist. v. EPA, 690 F.3d 9, 14 n. 8 (1st Cir. 2012); Thomas v. Jackson, 581 F.3d 658, 662 (8th Cir. 2009); Friends of Earth v. EPA, 333 F.3d 184, 186 n. 5 (D.C. Cir. 2003); Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002); Hayes v. Whitman, 264 F.3d 1017, 1021 n. 2 (10th Cir. 2001); Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1520 (9th Cir.1995)). If the statute unambiguously supports its

reading, courts should have noticed the disconnect between the statute and the regulation, but there has been none. Am. Farm Bureau, 792 F.3d at 296.

The Supreme Court also held that Chevron deference is appropriate when an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication, and the Clean Water Act definitely falls into this category. See id. (citing Brand X, 545 U.S. at 1002–03; Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 339 (2002); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132–33 (1985)).

Additionally, Congress required the EPA to establish TMDLs while not prescribing how the EPA would do so. Id. at 298. The EPA has chosen to lay out in detail in establishing TMDLs:

> (1) [H]ow and why it arrived at the number it chose; (2) how it thinks it and affected jurisdictions will be able to achieve that number; (3) why that number is necessary to implement the applicable water quality standard . . . ; (4) when it expects the TMDL to achieve the applicable water quality standard; and (5) what it will do if the water quality standard is not met.

Id. (alteration in original) (internal quotation marks omitted) (citations omitted).

TMDLs set the maximum amount of pollution a water body can absorb before violating applicable water quality standards and it is impossible to meet the standards by point-source reductions alone. Id. at 299. The CWA requires the drafter of a TMDL to consider nonpoint source pollution, and the Act assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states. Id. Nonetheless, the Act requires the EPA to consider nonpoint sources. Id.

Therefore, it is clear that "the congressional silence on how to promulgate a TMDL and the command that a TMDL be established only for waters that cannot be cleaned by point-source limitations alone combine to authorize the EPA to express load and waste load allocations." Id. at 300.

Here, according to the CWA, it is necessary for a TMDL to account for point and nonpoint sources, but the Act is silent on how to account for those sources. Also, the Act is silent on whether the EPA in calculating a TMDL may consider nonpoint source reductions in wasteload allocations for point sources. Therefore, it is ambiguous enough for the EPA to include a credit for anticipated BMP pollution reduction to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL. The EPA faithfully fills the gaps that Congress created.

B. *Chevron* Step Two

Chevron Step Two asks whether an agency made "a reasonable policy choice" in reaching its interpretation. Brand X, 545 U.S. at 997 (quoting Chevron, 467 U.S. at 845). Also, when the EPA's interpretation furthers the CWA requirements and the goal of achieving water quality standards, they are factors that support finding the agency's action reasonable under *Chevron* Step Two. Am. Farm Bureau, 792 F.3d at 307. In addition to the factors, a court can "consider legislative history to the extent that it may clarify the policies framing the statute." Id. (footnote omitted).

As discussed above, the CWA requires the drafter of a TMDL to consider nonpoint-source pollution. See supra Section IV.A. "Allocating the pollution load between point sources (primarily the EPA's responsibility) and nonpoint sources (the states' dominion) is a commonsense first step to [achieving] the target water quality." Am. Farm Bureau, 792 F.3d at 299–300 (citations omitted).

The CWA does not expressly define nonpoint sources, and nonpoint sources are exempt from CWA regulation; in turn, nonpoint sources are left to the states to regulate. See Adam M. Teel, The Billion Dollar Decision: How the Third Circuit Expanded the Power of the EPA in

Implementing Tmdls by Affirming Additional Mandates (Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3d Cir. 2015)), 55 Washburn L.J. 563, 571–72 (2016). However, the CWA requires states to take action on nonpoint source pollution and implement a management program, and the CWA provides to the states for achieving water quality standards through voluntary best management practices. See Adam M. Teel, The Billion Dollar Decision: How the Third Circuit Expanded the Power of the EPA in Implementing Tmdls by Affirming Additional Mandates (Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3d Cir. 2015)), 55 Washburn L.J. 563, 572 (2016).

The EPA has the authority to review and approve each step of the water quality standards process against the applicable requirements under the CWA, from the designation of uses to the establishment of water quality criteria to the listing of impaired waters to the establishment of TMDLs for impaired waters. See 33 U.S.C. § 1313(c)(3), (d)(2). If the EPA disapproves of the proposed TMDL, the EPA is directed to establish its own TMDL. 33 U.S.C. § 1313(c)(3), (d)(2)

In 2000, Congress added a section to the CWA in relation to the Chesapeake Bay Program that "[t]he [EPA] . . . shall ensure that management plans are developed and implementation is begun . . . to achieve and maintain [the goals of the Program]." 33 U.S.C. § 1267(g) (alteration in original). It strongly suggests that Congress did not have a problem with the EPA's role in developing goals for the watershed even though the EPA had promulgated its TMDL rules long before § 1267 was added to the U.S. Code, including 40 C.F.R. § 130.2(i), which provides that BMPs can make waste load allocation for point sources less stringent. See Am. Farm Bureau, 792 F.3d at 308.

Here, the EPA disapproved of the State of New Union TMDL, and the EPA is directed to establish its own TMDL. Originally, it is the State of New Union's responsibility to manage

nonpoint source pollution, but now the EPA needs to develop a TMDL. The CWA requires the drafter of a TMDL to consider nonpoint-source pollution.

Allocating the pollution load between point and nonpoint sources is a reasonable, commonsense first step to achieving the target water quality. Controlling both point-source and nonpoint-source pollution furthers the Act's goal of achieving water quality standards, and this way also furthers the Act's requirement that the TMDL account for both point and nonpoint sources. Concerning nonpoint sources, the CWA provides to the states for achieving water quality standards through voluntary best management practices, and states can make waste load allocations for point sources less stringent through BMPs. It is also reasonable the drafter of a TMDL, in this case, the EPA, considers BMPs that would reduce nonpoint resources in making waste load allocations for point sources less stringent.

The legislative history also supports this conclusion. When Congress added a section to the CWA in relation to the Chesapeake Bay Program, Congress did not have a problem with the EPA's role in developing goals for the watershed even though the EPA had promulgated its TMDL rules, including 40 C.F.R. § 130.2(i), and it would clarify the policies that Congress presumes the EPA's regulations that the TMDL process provides for nonpoint source control tradeoffs are reasonable.

Therefore, the EPA made a reasonable policy choice in reaching the 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.

On the contrary, the reasonable assurance standard allegedly supported by the EPA's previous guidance was not promulgated through the notice-and-comment rulemaking process of the Administrative Procedure Act ("APA"), and not a proper standard. See 5 U.S.C. § 553.

CONCLUSION

For the foregoing reasons, Appellee-Cross Appellee the State of New Union respectfully ask this Court to affirm the District Court's ripeness determination, the grant of summary judgment in favor of the State of New Union regarding the EPA's rejection of the New Union TMDL, and the grant of summary judgment in favor of the EPA and against CLW on Validity of Wasteload Allocation Credits based on assumed nonpoint source BMPs. Also, the State of New Union respectfully requests this Court to reverse the District Court's grant of summary judgment in favor of CLW and against the EPA on the CLW's challenge to the EPA's phased annual TMDL and remand for further proceedings consistent with that decision.

Respectfully submitted,