Team 45

CA No. 20-000123

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellant-Cross Appellee,

and

THE STATE OF NEW UNION,
Plaintiff-Appellee-Cross Appelle,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

Appeal from the United States District Court for New Union
In No. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

BRIEF FOR ENVIRONMENTAL PROTECTION AGENCY

Plaintiff-Appellee-Cross Appellant

ORAL ARGUMENT REQUESTED

NON-MEASURING BRIEF

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JURISDICTIONAL STATEMENT

The United States Environmental Protection Agency (EPA) appeals from an Opinion and Order denying EPA's motion for summary judgment in part, granting the motion for summary judgment in part for Chesaplain Lake Watch (CLW), and granting New Union's motion for summary judgement, entered September 1, 2021, by the Honorable Judge Remus in the United States District Court for the District of New Union, No. 66-CV-2020 and 73-CV-2020. Both actions were brought pursuant to the judicial review provisions of the Administrative Procedure Act, APA § 702, and this court has jurisdiction pursuant to 28 U.S.C. § 1331 because the cause of action is provided by federal law. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291. A notice of appeal was timely filed by both parties seeking review under this Court's jurisdiction pursuant to section 509(b) of the Clean Water Act (CWA). 33 U.S.C. § 1369(b) (2012). The petitions have been rightfully consolidated by this Court for the purpose of its review.

STATEMENT OF ISSUES PRESENTED

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

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

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

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

STATEMENT OF THE CASE

A. Clean Water Act

The Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act (CWA), is a regulatory framework under which EPA issues permits and regulations regarding the discharge of pollutants into waters of the United States. 33 U.S.C.A. § 1313 (a)(1). Under the CWA, polluters fall into two categories: point source and nonpoint source. 33 U.S.C.A. § 1362(14). Point source polluters include, but are not limited to, discharge pipes, plants, and concentrated animal feeding operations. *Id.* Nonpoint source polluters generally include agricultural runoff and other non-specific sources. *Id.* Because of their usually discrete nature, point source polluters are subject to the CWA permitting program and must obtain state issued National Pollutant Discharge Elimination System (NPDES) permits to operate. 33 U.S.C.A. § 1342(a). EPA is tasked with overseeing the issuance of permits, but this responsibility is largely that of the states.

States are required to evaluate and identify any water bodies that do not meet water quality standards (WQS) set forth by EPA. 33 U.S.C.A. § 1313 (c). Once a state has identified an impaired waterway and submitted to EPA for approval, the state is then tasked with creating a "total maximum daily load" (TMDL) for the relevant pollutant. 33 U.S.C.A. § 1313 (d)(1). The

TMDL is determined based on scientific research and study that culminates in a recommendation on how much of a pollutant can be emitted into the water body to bring the water body into compliance with the WQS. *Id.* The state submits the proposed TMDL to EPA for approval. If a state fails to submit a TMDL for an impaired waterway or if EPA deems the TMDL insufficient, it may reject the TMDL and adopt its own. 33 U.S.C.A. § 1313 (d)(4)(a).

Implementation of the TMDL is the responsibility of the states. 33 U.S.C.A. § 1313 (d)(1)(d). Point source pollution outputs are regulated via NPDES permits and nonpoint source pollution can be regulated via Best Management Practices (BMPs). 33 U.S.C.A. § 1342(p). If a TMDL is not achieving the goal of bringing the impaired waterbody into compliance with the WQS, EPA may also amend the TMDL as necessary. 33 U.S.C.A. § 1313 (d)(2).

B. Statement of Relevant Facts

Lake Chesaplain is a natural lake located entirely within the State of New Union, bound by Chesaplain National Forest to the west, agricultural grounds to the east, and the City of Chesaplain Mills to the north. R. at 7. Union River flows into Lake Chesaplain from the north and the lake's outlet is the Chesaplain River, a navigable water of the United States. *Id.*

Over the past 30 years, the water quality at Lake Chesaplain has declined significantly. Id. The area saw significant development that included the production of ten large-scale hog production facilities (legally designated as CAFOs) and a large-scale slaughterhouse. *Id.* Additionally, single-family residential development increased in the area, which increased the size of the local septic system and encouraged the creation of a local sewage treatment plant. *Id.*

Due to these development activities, Lake Chesaplains' once clear water, which attracted swimmers and boaters alike, visibly declined and began producing offensive odors. *Id.* Swaths of algae formed, causing a decline not only in water clarity but also fish productivity. The lake

became unsuitable for swimming or consumption and tourism revenue fell with the steadily decreasing property values. *Id*.

As part of New Union's water quality standards, Lake Chesaplain is designated as Class AA, the highest classification available and reserved for waters that can be used as a drinking water source and other primary contacts. R. at 8. The slaughterhouse located on the lake is considered a point source polluter and has been issued a NPDES permit for a direct discharge into the Union River. R. at 7. The sewage treatment plant discharges directly into Lake Chesaplain and has also been issued an NPDES as a point source polluter. *Id*. The hog CAFOs and the septic systems are considered nonpoint source polluters and are not subject to CWA permits. *Id*.

In 2008, New Union created a Lake Chesaplain Study Commission that issued a report in August 2012. R. at 8. The report stated: 1) the lake was suffering from eutrophication (excessive algae growth which makes the lake less biologically productive, 2) the eutrophication was causing decreased clarity, offensive odors, and a decrease in dissolved oxygen (DO), and 3) the eutrophication was caused by excessive amounts of phosphorus. *Id*. The commission determined that the phosphorus levels in the lake varied from 0.020 to 0.034 mg/l, which was almost twice the recommended level of 0.014mg/l. The commission noted three water quality violations: DO, odor, and water clarity. *Id*.

In 2014, the New Union Division of Fisheries and Environmental Control (DOFEC) adopted a 0.014mg/l phosphorus WQS for Class AA waters, listed Lake Chesaplain as an impaired waterway and submitted the findings to EPA. EPA accepted the submission. *Id*. In 2015, DOFEC set out to establish a TMDL for Lake Chesaplain. *Id*. The commission issued a supplemental report in July 2016 reducing the maximum loading from 180 metric tons to 120

metric tons annually and identifying existing sources of phosphorus. *Id*. Part of the supplemental report indicated that the two nonpoint source polluters, the CAFOs and the septic systems, were substantial contributors to the phosphorus outputs. R. at 9. The report also noted that neither NPDES permit issued to the point source polluters included phosphorus limitations. *Id*.

In October 2017, the DOFEC publicly noticed a phased TMDL implementation plan with the following phases: 7% reduction from 180 metric ton baseline in the first year, 14% in the second year, 21% in the third year, 28% in the fourth year, and 35% by the fifth year. *Id*. The plan included point source reductions via permit limits and nonpoint source reductions via Best Management Practice (BMP) programs. *Id*.

After receiving pushback from local stakeholders on the implementation plan, DOFEC, in July 2018, adopted a TMDL that consisted solely of a 120 metric ton annual maximum, without mention of wasteload or load allocations. R. at 9-10. After careful review, EPA determined that the new TMDL was not sufficient to meet water quality standards and rejected DOFEC's TMDL. R. at 10. EPA then adopted the original proposed TMDL by DOFEC, consisting of a 35% reduction of phosphorus discharges by both point and nonpoint sources, and a five-year phasing period. *Id*. EPA called this implementation plan "Chesaplain Watershed Implementation Plan" (CWIP). Id. EPA incorporated the entire record of scientific reports and public comments before the DOFEC into its own record. *Id*.

To date, New Union has failed to renew the expired NPDES permits for both the slaughterhouse and the sewage treatment plant. *Id*. Both continue to operate under the conditions of their expired permits and have timely filed for renewal. *Id*. Neither permit includes phosphorus reductions. *Id*. New Union has also failed to institute any BMPs included in the CWIP and both nonpoint source polluters continue emitting phosphorus at normal rates. *Id*.

C. Procedural History

Both New Union and CLW challenge various aspects of EPA's adoption of its own TMDL determination for phosphorus loadings and rejection of the TMDL proposed by New Union. R. at 4. The State of New Union filed action No. 66-CV-2020 on January 14, 2020, alleging EPAs rejection of New Union's TMDL in favor of its own was invalid under Clean Water Act § 303(d), 33 U.S.C.A § 1313 (d). *Id.* CLW filed action No. 73-CV-2020 on February 15, 2020, seeking a declaration that the TMDL adopted by EPA does not sufficiently reduce phosphorus allocations enough to meet water quality standards. R. at 5. The district court granted unopposed motions to consolidate the two actions on March 22, 2020, and EPA lodged the administrative record with the Court on July 1, 2020. R. at 10. Cross motions for summary judgement were submitted by EPA, CLW, and New Union. R. at 5. The district court denied EPA's motion for summary judgement in part, granted CLW's motion for summary judgement in part, and granted New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed TMDL in favor of its own. *Id.* EPA, CLW, and the State of New Union each filed a timely Notice of Appeal. R. at 2.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court was correct in finding that EPA's determination to suggest nonpoint source BMPs as an offset to point source reductions as a matter of planning for water quality standard compliance is not arbitrary and capricious or an abuse of discretion. However, the district court erred in finding that the foregoing issues were ripe for review and determining that EPA's interpretation of the phrase "total maximum daily load" in 40 C.F.R. § 130.2(i) was unreasonable, ambiguous, and contrary to the statute pursuant to *Chevron* step one.

EPA's interpretation of what a "total maximum daily load" entails is reasonable and should be granted *Chevron* deference. New Union's argument that the interpretation is contrary to plain meaning of the term "total," as well as being contrary to the structure of the CWA and its incorporation of principles of comity and federalism is not supported by the *Chevron* two-part test. Although the district court erroneously held that EPA's interpretation did not pass Step One of the Chevron framework due to the literal definition of the word "total," numerous decisions prior to this case have found the phrase "total maximum daily load" to be ambiguous without any Congressional direction for EPA to follow. Thus, because the statute itself is silent on the definition and plain meaning of the phrase, EPA is entitled to *Chevron* deference given that the interpretation is not unreasonable, arbitrary, capricious, or manifestly contrary to the CWA. In fact, the interpretation allows for EPA to achieve the overall purpose of the Act and provides EPA with the necessary tools to gain a better understanding of a TMDL plan.

Similarly, and in conjunction with the foregoing argument, because the phrase "total maximum daily load" is subject to multiple interpretations pursuant to previous case law, Step One of the *Chevron* framework does not apply here either. Again, EPA is entitled to deference in its interpretation of the word "daily" and what it means in the context of the entire phrase. EPA's adoption of an annual pollution loading reduction does not violate the CWA because of statute itself only requires that the load "be established at a level necessary to implement the applicable water quality standards…" 33 U.S.C.A. § 1313 (d)(1)(C). Thus, the word "daily" is merely a suggestion. If taken to mean literally, EPA would not be able to carry out the Act's purpose adequately and efficiently if the loading reduction needed to be established at another measure of mass per time. It would be unreasonable to require one measure of time for all pollutants in every TMDL plan and would plainly counteract the overall statutory scheme of the CWA.

Finally, EPA respectfully asks this Court to uphold the lower court's decision finding that the adoption of credits for anticipated BMP pollution reductions was not arbitrary or capricious. EPA need not receive assurance of BMP implementation prior to adopting said credits. The lower court correctly applies the "arbitrary and capricious" standard and defers to EPA's reasonable interpretation of the statute given that the TMDL program is a "planning and information program, not an implementation program." R. at 16.

STANDARD OF REVIEW

Subject-matter jurisdiction is a matter of law, which is reviewed de novo and a district court's grant or denial of summary judgment is also reviewed de novo. *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016); *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998); *Gasner v. Bd. of Supervisors of the City of Dinwiddie, Va.*, 103 F.3d 351, 356 (4th Cir. 1996); *Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994).

ARGUMENT

I. EPA'S REJECTION OF NEW UNION'S TMDL IN FAVOR OF ITS OWN IS NOT AN ISSUE THAT IS RIPE FOR JUDICIAL REVIEW

EPA respectfully requests this Court find that the district court erred in ruling that EPA's rejection of New Union's "total maximum daily load" [hereinafter "TMDL"] in favor of its own presented an issue that was ripe for judicial review. Ripeness is a doctrine that draws "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993). If a claim is not ripe for judicial review, it should be dismissed for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. U.S.*, 217 F.3d 770, 784 n. 9 (9th Cir. 2000). The Supreme Court has provided a two-part test when determining the ripeness of an issue: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v.*

Gardner, 387 U.S. 136, 149 (1967). The Supreme Court has also provided three factors to consider when challenging the legality of agency action: "(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).

In the context of agency action, the fitness of an issue rests on if the agency action in question is considered final. Pursuant to the APA, judicial review is only allowed on "'final agency action' for which there is no other adequate remedy in a court." *Transport Robert (1973) LTEE v. U.S. Immigration & Naturalization Serv.,* 940 F.Supp. 338, 340 (D.D.C.1996) (quoting 5 U.S.C. § 704). For judicial review to be applicable, a court must "look primarily to whether the agency's position is 'definitive' and whether it has a 'direct and immediate ... effect on the day-to-day business' of the parties challenging the action." *See F.T.C. v. Standard Oil Co.,* 449 U.S. 232 at 239-40, cited with approval in *NRDC, Inc. v. EPA*, 16 F.3d 1395, 1407 (4th Cir. 1993).

A. EPA's denial of New Union's TMDL in favor of its own is not considered final agency action.

Despite having gone through notice and comment, EPA's adoption of New Union's first TMDL is not a final agency action. Implementation of the TMDL is the responsibility of New Union and to date, no implementation has begun. 33 U.S.C.A. § 1313 (e); R at 10. The two expired NPDES permits issued to the point source polluters in this case have not been renewed and the polluters continue to operate without phosphorus reductions and without regard to or with any burden associated with compliance with the TMDL. R. at 10. Additionally, the non-point source pollution reductions listed in the TMDL have not been implemented and New Union has yet to issue any plan or directive related to BMPs. *Id.* The adoption of the TMDL by

EPA has had no "direct and immediate… effect" on the point-source or nonpoint source polluters of Lake Chesaplain as required to be considered a final agency action. *Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430, 435–36 (D.C. Cir. 1986). Because no action has been taken by either EPA or New Union in implementing the TMDL, and all parties have been able to continue unimpeded, the TMDL can hardly be called a final agency action. EPA argues that in the current case, no concrete implementation has happened, no regulations are being imposed, and thus, the issue is not ripe.

B. EPAs adoption of the Lake Chesaplain TMDL does not harm New Union or CLW.

Neither New Union nor CLW are harmed by EPA's adoption of the Lake Chesaplain TMDL. The CWA requires states to identify water bodies that do not meet water quality standards and adopt TMDLs that will bring the water body into compliance with water quality standards. 33 U.S.C.A. § 1313 (c).

Here, New Union has been issuing NPDES permits based off of pre-TMDL standards, and thus far, has not renewed any previously issued permits for point source polluters under the new TMDL. Adopting EPA's TMDL and issuing permits in compliance with the new TMDL will not harm New Union because the cost associated in complying with the TMDL will be borne by the point source polluters, not the state. Additionally, the only action New Union is required to take with regards to the newly adopted TMDL is issuing NPDES permits that comply with the new reduction allocations. 33 U.S.C.A. § 1313 (e). New Union has been required to issue NPDES permits related to point source pollution previously and renewing the already existing permits in compliance with the newly adopted TMDL will not harm or burden New Union. New Union is engaging in a regulatory process that they have been involved with prior to this litigation. The BMPs to be implemented by New Union also should not be seen as a burden

or harm as the EPA only has a supervisory role in implementation of the TMDL, and thus cannot force New Union to implement BMPs. 33 U.S.C.A. § 1313(e).

Further, the TMDL that New Union will be implementing was initially proposed by New Union itself and was only abandoned after notice and comment provided pushback from industry hog CAFOs and others concerned about nonpoint source regulation in the proposed plan. R. at 9-10.

CLW is also not facing harm from the TMDL. CLW's position stands to benefit from implementation of the TMDL by EPA and New Union by providing a cleaner Lake Chesaplain for residents and recreational users. While CLW may feel that the TMDL is not stringent enough, arguing that they will be harmed as opposed to benefit from the TMDL does not hold water. CLW had the opportunity during notice and comment to include their proposals to EPA and New Union, and going forward, CLW may lobby New Union upon implementation of the TMDL to enforce nonpoint source limitations more effectively. R at 10. Neither New Union or CLW have experienced a "direct and immediate…effect on the day-to-day business" as expressed in *Standard Oil.*

EPA respectfully requests this Court find that the district court erred in ruling that EPA's rejection of New Union's TMDL in favor of its own presented an issue that was ripe for judicial review.

II. THE EPA'S INTERPRETATION OF THE TERM "TOTAL MAXIMUM DAILY LOAD" IS NOT CONTRARY TO LAW AND SHOULD BE GIVEN CHEVRON DEFERENCE.

EPA respectfully requests this Court find that the district court erred in its ruling because EPA is entitled to *Chevron* deference in its interpretation of what a TMDL encompasses. It is well known that the analysis of this interpretation is governed by the framework established by

Chevron, U.S.A, Inc. v. NRDC, Inc., 467 U.S. 837 (1984). In fact, the district court itself has analyzed the interpretation under this legal test. However, the district court erred in finding that the EPA failed step one of the *Chevron* framework because the interpretation does not contradict the intention of Congress.

Congress granted broad regulatory authority to EPA under the CWA by providing in the Act that "the Administrator of the Environmental Protection Agency … shall administer this chapter." 33 U.S.C.A. § 1251(d). Notwithstanding this authority, the CWA § 303(d)(1)(C) provides that "[e]ach State shall establish for the waters identified … and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies…" 33 U.S.C.A. § 1313. In turn, EPA defines a TMDL as "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). "An agency's interpretation of a statute it administers is entitled to deference under [*Chevron*]." *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F.Supp.3d 160, 170 (D.D.C. 2019); *see also NRDC, Inc. v. EPA*, 301 F.Supp.3d 133, 140 (D.D.C. 2018). The *Chevron* analysis consists of two steps. Courts first analyze "whether Congress has spoken directly to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). If so, the plain and literal language of the statute controls. *Id*. If Congress has not spoken directly on the issue, then courts will analyze whether the agency's interpretation is "based on a permissible construction of the statute" in light of its language, structure, and purpose. *Id*. at 843.

Step one of the Chevron analysis allows courts to employ "traditional tools of statutory construction" when analyzing Congress's plain and unambiguous intent behind the issue at hand. *Chevron*, 467 U.S. 837. However, courts may not consider legislative history to find Congress's intent during step one of the analysis. *See U.S. v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008).

While the plain language of CWA § 303(d) states that a TMDL should be established, it does not define what the phrase means. *NRDC, Inc. v. EPA*, 301 F. Supp. at 137. Neither does the provision demonstrate a clear and unambiguous intent other than requiring the TMDL to be "established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C.A. § 1313 (d)(1)(C). Even further, several courts have found the CWA itself contains several gaps in the promulgation of TMDLs. In fact, some courts have found the term TMDL to be ambiguous on its face. *NRDC v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001) (finding the term to be susceptible to multiple meanings and thus "may be expressed by another measure of mass per time"); *see also Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 245 (D.D.C. 2011) (EPA's interpretation of TMDL to allow periodical violations is reasonable given the CWA's silence on the issue); *Am. Farm Bureau Fed'n v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015) (finding the word "total" to be ambiguous and subject to several meanings).

In this case, New Union contends that EPA's definition of TMDL in 40 C.F.R. § 130.2 is an incorrect interpretation of the term as provided in section 303(d). R. at 2. Similarly, the district court found for New Union and noted that the Third Circuit "misconstrued the plain language and structure of the Clean Water Act" in its decision in *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3d Cir. 2015). R. at 13-14. The Court reasoned that the word "total" was unambiguous and, therefore, that step one of the *Chevron* analysis precluded EPA's interpretation. Even if the word "total" on its own were to be unambiguous, notwithstanding prior decisions finding ambiguity in the same word, "a reviewing court should not confine itself to examining a particular provision in isolation." *Nat'l Ass'n of Home Builders*

v. Defs. of Wildlife, 551 U.S. 644, 666 (2007). *Nat'l Ass'n of Home Builders* further explains that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id*. The plain language of section 303(d) itself forced EPA to define TMDL on its own given the lack of a statutory definition and thus does not provide a sufficient basis for EPA's interpretation to fail at step one.

Given that the phrase TMDL is ambiguous, step two in the *Chevron* analysis provides that this Court should defer to EPA's interpretation as long as it is reasonable. *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). In determining whether an agency's construction of a statute is permissible, controlling weight is given to an agency's interpretation of the statute it administers, in deference to the agency's expertise on the matter. *Id*. at 843-844. In fact, a court may only review an agency action or interpretation if it is found to be "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844. In addition, courts are especially deferential where the statute contains a broad delegation of authority to the agency for administration of said statute. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 115 S. Ct. 2407, 2416 (1995). In the present case, as previously mentioned, the CWA expressly provides that the Administrator shall administer the statute unless otherwise provided. *See* 33 U.S.C.A. § 1251(d). It is important to review the CWA's overall purpose. CWA § 101(a) establishes the Congressional declaration of goals and provides that the objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251. EPA's definition of TMDL consists of the sum of wasteload allocations and load allocations. It is not unfathomable that the purpose behind this definition is to gain a better understanding of the specific pollutants that are affecting a body of water to make a more

informed decision on the matter. In fact, the district court itself found § 303(d) to be an "information gathering provision." R. at 13. What better way to gather information if not requiring as much specificity as possible? Both legislative history and the overall purpose of the Act support EPA's interpretation of a TMDL. EPA could not effectively review a TMDL submission without the most accurate information, including allocations of pollutants, to achieve proper state water quality standards. Prior to 1972, EPA had very little authority to enforce state water quality standards. However, the 1972 amendments to the Act subsequently granted EPA the authority to oversee and enforce the drafting and implementation of state water quality standards. In *United States v. Haggar Apparel Co.*, the Supreme Court found that the Act itself relies on EPA's discretion "to determine how best to implement the policy in those cases not covered by the statute's specific terms." *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). Therefore, when considering both the legislative history and the purpose of the Act, it is not unreasonable for EPA to require specific allocations of the pollutants.

In addition, case law has consistently granted deference to EPA when interpreting the CWA's provisions where Congress has remained silent on the issue. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (deferring to EPA's definition of "waters"); *see also Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (deferring to EPA's discretion in enforcing WQS through NPDES program); *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) (granting deference to EPA's discretion managing § 303(d) list). New Union's argument that EPA's regulation of TMDLs is contrary to the law is not supported by law. Although the district court found EPA's interpretation to be barred by step one in the *Chevron* framework, case law has provided that the plain language in the statute does not demonstrate the intent of Congress behind the enactment of § 303(d). Thus, EPA's interpretation of TMDLs requiring specific

wasteload and load allocations is not unreasonable because in only requiring a single number of the pollutants, EPA would have difficulty in achieving the CWA's purpose to improve water quality for those impaired waters (if only a single number of the pollutants was required). As such, we respectfully request this Court reverse the district court's erroneous determination that EPA's TMDL definition provided in 40 C.F.R. § 130.2 is contrary to law.

III. EPA'S PHASED TMDL CONSISTING OF ANNUAL PHOSPHORUS POLLUTION REDUCTIONS CONSTITUTES A VALID TMDL UNDER CWA § 303(d).

The TMDL implemented by EPA, which includes a phased implementation over a five-year period and annual phosphorus reduction allocations is a valid TMDL under CWA § 303(d). EPA respectfully requests that this Court find that the district court erred in ruling that the adopted TMDL was not proper.

The Clean Water Act requires states to identify navigable waters within the state that do not meet water quality standards. For each pollutant that fails to meet the required standards in those waters, "[e]ach State shall establish ... the total maximum daily load, for those pollutants." 33 U.S.C. § 1313 (d)(1)(C). "Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." *Id.* The term "total maximum daily load" is not defined in the CWA and the Supreme Court has not provided a definition via case law. The Second, Third, and D.C. Circuits are the only circuits that have ruled on this issue thus far and all have evaluated the term "total maximum daily load" under the *Chevron* framework, finding the term to be ambiguous under step one. *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837 (1984); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 245 (D.D.C. 2011); *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792

F.3d 281, 298 (3d Cir. 2015); *NRDC, Inc. v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001). EPA agrees that the term is subject to more than one interpretation and argues that EPA's construction is reasonable.

A. Annual reductions do not violate the TMDL requirements in the CWA § 303(d).

The Second, Third, and D.C Circuits have held that the term "total maximum daily load" itself is ambiguous under *Chevron* step one. *Am. Farm Bureau Fed'n*, 792 F.3d at 298 ("Congress was ambiguous on the content of the words 'total maximum daily load…'); *NRDC, Inc.*, 268 F.3d at 98–99 ("We believe, however, that the term 'total maximum daily load' is susceptible to a broader range of meanings."). EPA agrees that the phrase "total maximum daily load" is ambiguous and argues more specifically that the term "daily" is subject to more than one interpretation.

The term "total maximum daily load" is a term of art that refers to the mass of a pollutant over a period of time. The text itself provides a suggested unit of time: daily. However, reduction allocations are not required to be listed in daily terms to comply with the Clean Water Act. The Clean Water Act only requires that "[s]uch load shall be established at a level necessary to implement the applicable water quality standards…" 33 U.S.C.A § 1313 (d)(1)(C). Additionally, EPA's implementing regulations note that TMDLs "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2 (i). The use of the phrase "mass per time" suggests that other units of measurement could be appropriate. If Congress intended for the word "daily" to have a strict meaning, the implementing regulation would instead state "mass per day" not "mass per time." This suggests that the concern of Congress was not the cadence of the reduction allocations but only that the reductions achieved the purpose of satisfying water quality standards. *Anacostia Riverkeeper, Inc.*, 798 F.Supp.2d at 245 ("[t]he

CWA's references to water quality standards require only that a TMDL set load levels 'necessary to attain and maintain applicable water quality standards,' 33 U.S.C.A. § 1313 (d)(1)(C) and does not otherwise refer to any particular timeframe."). The time period with which the reduction allocations must be measured has been discussed only by the Second, Third, and D.C. Circuits. Each circuit has held that other units of time are acceptable in the implementation of a TMDL. *Id.*; *Am. Farm Bureau Fed'n*, 792 F.3d at 298; *NRDC, Inc.*, 268 F.3d at 98–99.

At *Chevron* step two, the question becomes whether the agency interpretation is reasonable. *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Here, EPA's determination that an annual load allocation is more appropriate for a phosphorous TMDL than a daily allocation is reasonable.

TMDL implementation is left to the states and EPA to determine. CWA § 303(e). Implementation includes the discretion to determine the cadence by which the reduction is required to take place. *Anacostia Riverkeeper, Inc.,* 798 F.Supp.2d at 245 ("The CWA does not specify a particular time period during which a TMDL must prevent violations of applicable water quality standards."). Due to the ever-changing nature of phosphorus levels in waterbodies based on seasonal and weather patterns, a daily maximum load would not be a reasonable time measurement by which to require reductions. *NRDC, Inc.,* 268 F.3d 91 at 99. The Second Circuit has specifically agreed with the EPAs autonomy to dictate cadence with respect not only to TMDLs, but also reductions in phosphorus specifically:

> In short, the CWA's effective enforcement requires agency analysis and application of information concerning a broad range of pollutants. We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis. Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one. Accordingly, we agree with EPA that a "total maximum daily load" may be expressed by another

> measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies.

NRDC, Inc., 268 F.3d at 98–99.

In holding that TMDLs must be portrayed in only daily terms, the Twelfth Circuit would be breaking with all three circuits that have ruled on this issue.

B. EPA's phased TMDL is sufficient to assure achievement of water quality standards at Lake Chesaplain.

The phased TMDL that EPA has adopted for Lake Chesaplain is congruent with the CWA's TMDL requirements. The Second Circuit reminds that "although Congress explicitly required the EPA to establish 'total maximum daily loads,' it nowhere prescribed *how* the EPA is to do so." *Am. Farm Bureau Fed'n*,792 F.3d 281 at 298. With the goal of achieving water quality standards, it is acceptable and may be necessary to implement reductions in such a way that increases or decreases over time. *Id. at* 300 ("promulgating an accurate TMDL… requires consideration of a timeline and of changes over time, [and] it is more consistent with the purpose of the Clean Water Act to express the deadline that the EPA relied on in calculating the TMDL than to make states and the public guess what it is."). Additionally, it is within the scope of the EPA to delineate a timeline by which the phased reductions will culminate in water quality standards being met. Here, EPA has done just that. The five-year phased TMDL provides a timeline to polluters and the public of when Lake Chesaplain will reach the appropriate water quality standards and the rate at which those reductions will take place over those five years.

As previously mentioned, the term "total maximum daily load" is ambiguous and providing deference to the EPA and states' implementation of TMDLs is paramount to their success. *Id. at* 306 ("Interpreting "total maximum daily load" as requiring one number and nothing more is in tight tension with the Clean Water Act's goal…").

IV. EPA'S ADOPTION OF CREDITS FOR ANTICIPATED BMP POLLUTION REDUCTION WAS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION.

EPA respectfully requests this court to uphold the district court's determination that the EPA's adoption of credits for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was not arbitrary and capricious or an abuse of discretion due to lack of assurance of BMP implementation.

CWA §303(d) requires states to identify waters where current pollution control technologies alone cannot meet the water quality standards set for that waterbody. The Act instructs states to set a TMDL to be approved or disapproved by EPA. If the EPA does not approve of the TMDL, it must promulgate its own water quality standard for the state. 33 U.S.C.A. § 1313 (a)(3)(A)-(C) & (b).

EPA's regulations define TMDLs as the "sum of the individual WLAs [wasteload allocations] for point sources and Las [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). Section 130.2 also defines a "wasteload allocation" as the "portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution," § 130.2(h), and a "load allocation" as the "portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources," § 130.2(g).

A. The EPA does not have to get reasonable assurance that nonpoint source reductions will be achieved.

The EPA has stated in its regulations that nonpoint source load allocations may be credited towards point source wasteload allocations:

> 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.

40 C.F.R. § 130.2(i).

The CWA, while not explicit on credits for future BMP use, has been interpreted in regulation and case law to not only allow, but require allocation to nonpoint source load allocations.

> TMDLs...must take into account pollution from both point and nonpoint sources. We believe congressional silence on how to promulgate a TMDL and the congressional command that a TMDL be establishedonly for waters that cannot be cleaned by point source limitations alone (necessarily implying that, whatever form the TMDL takes, it must incorporate nonpoint source limitations) combine to authorize the EPA to express load and waste load allocations. To be sure, the statute does not command the EPA's final regulation to allocate explicitly parts of a load among different kinds of sources, but we agree with the EPA that it may do so.

Am. Farm Bureau Fed'n v. U.S. E.P.A. 792 F.3d 281 at 301 (2015).

While EPA can approve TMDLs that include credits for nonpoint source BMP reductions, it does not itself implement those BMPs, which is the responsibility of the state where the impaired waterway is located. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026-27 (11th Cir. 2002) ("The Act generally leaves regulation of non-point source discharges through the implementation of TMDLs to the states…The Court finding "Georgia has primary authority and responsibility for issuing permits and controlling nonpoint source pollution in that state…EPA, for its part, has a supervisory authority."). This allows states the flexibility to adapt nonpoint source limitations to cover all polluters contributing to the impaired waterways and to hit the TMDL targets while EPA helps to control point source polluters through NPDES permits. *Pronsolino v. Nastri,* 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs serve as a link in an

implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction.").

Further, TMDLs are considered an implementation plan rather than an enforcement mechanism. R. at 16. The enforcement of TMDLs comes from permitting of point source polluters by EPA and New Union, while enforcement of nonpoint source polluters falls specifically on New Union. If New Union fails to meet the water quality standard set by the TDML through regulation of its own, then the TMDL will be revised to meet those standards. 33 U.S.C.A. §1313(d)(4)(A).

The CWA places authority in the EPA in regulating TMDLs. However, the statutory language regarding TMDLs in the Clean Water Act is ambiguous at best as to how to promulgate a TMDL. The Act requires that states set a TMDL and that EPA either approve or disapprove it. If the EPA does not approve the state created TMDL, it will create the TMDL itself.

In the CWA congress delegated authority to EPA for divisions of load and waste load allocation in a TMDL. 40 C.F.R. § 130.2(i) states that you can credit point source pollution from nonpoint source reductions which was confirmed in *American Farm Bureau Federation*. Although nonpoint source reductions cannot be enforced by the EPA, New Union can require the use of BMPs by nonpoint source polluters to meet the TMDL. This is analogous towards *Meiburg*, in that the EPA takes only a supervisory role with implementation processes for nonpoint source polluters, the implementation itself falls squarely on New Union. This concept was also stated in *Pronsolino*, putting implementation for nonpoint source polluters squarely on New Union, not the EPA.

B. EPA's interpretation of the statute is entitled to *Chevron* deference.

The CWA gives broad discretion to EPA in approving or disapproving of proposed TMDLs, an authority delegated by Congress in § 303(d)(1). The Supreme Court has held that a court must have deference to an agency's statutory interpretation when (1) Congress either did not address the issue in question directly or addressed the issue ambiguously and (2) the agency is responsible for implementing the statute and it has interpreted the statute reasonably, then the agency's interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." C*hevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984) (If the subject matter is technical, complex, and dynamic; agencies have authority to fill gaps where the statutes are silent); *Morton v. Ruiz*, 415 US 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

An agency's statutory interpretation is entitled to *Chevron* deference when "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *U.S. v. Mead Corp.*, 533 U.S. 218 at 226-27. Courts have held that EPA holds the authority to interpret how to promulgate a TMDL. *Pronsolino v. Nastri*, 291 F.3d at 1129 ("EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of §303(d)(1) waters and TMDLs.").

To find that an agency interpretation is reasonable, a court need not conclude that it is the *best* interpretation, merely that it is "rationally related to the goals" of the statute. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (emphasis added). Step one of *Chevron* asks if the

statute is explicit and unambiguous, which the statute for TMDLs is not. The language, while explicit on the process of promulgating a TMDL, does not speak to the actual makeup of the construction of the remediating measures. Because the statute is ambiguous on time frame, as well as on what measures must be taken, EPA is delegated that authority.

It is clear the agency had the authority to reject the revised TMDL and to select to use the original proposed TMDL pursuant to CWA § 303(d)(2) so long as it was a reasonable conclusion. The EPA determined this TMDL plan to be the best option after receiving the inadequate TMDL from New Union. The adopted TMDL uses a combination of reductions through point source and nonpoint source reductions over the five-year period. The TMDL provides a framework for the water in Lake Chesaplain to come back into line with the water quality standards set by the TMDL. The accepted TMDL, while controversial, was not challenged for its scientific conclusion, and was only originally changed due to public reaction. R. at 9. EPA saw the revised TMDL lacking in wasteload allocations or load allocations and thus rejected it, and adopting the original TMDL proposal, which they are authorized to do under CWA § 303(d)(2). This action was not unreasonable, let alone arbitrary, capricious or an abuse of discretion.

EPA respectfully requests this court to uphold the district court's determination that the EPA's adoption of credits for anticipated BMP pollution reductions to reduce the stringency of wasteload allocations for point sources for implementation of the Lake Chesaplain TMDL was not arbitrary and capricious or an abuse of discretion due to lack of assurance of BMP implementation.

CONCLUSION

EPA's rejection of New Union's TMDL in favor of a phased, annual TMDL that includes allocation for both point source and nonpoint source phosphorus pollution was valid under the

CWA, but because it is not final agency action and does not cause harm to New Union or CLW, the issue is not ripe for judicial review. The phrase "total maximum daily load" is ambiguous, and deference should be provided to EPA. Additionally, EPA's use of a credit for anticipated BMP pollution reductions is not arbitrary and capricious.

WHEREFORE, ENVIRONMENTAL PROTECTION AGENCY RESPECTFULLY REQUESTS THIS COURT ISSUE A RULING:

1. Reversing the District Court of New Union's grant of summary judgment declaring that the foregoing issues are ripe for judicial review.

2. Reversing the District Court of New Union's grant of summary judgment declaring the Environmental Protection Agency's definition of a TMDL is contrary to law, as an incorrect interpretation of the term "total maximum daily load" in CWA § 303(d).

3. Reversing the District Court of New Union's grant of summary judgment declaring the Environmental Protection Agency's adoption of a TMDL for Lake Chesaplain Watershed consisting of an annual pollution loading reduction to be phased over five years violates the CWA § 303(d) requirements for a valid TMDL.

4. Affirming the District Court of New Union's grant of summary judgment finding that the Environmental Protection Agency's adoption of a credit for anticipated BMP pollution reductions is not arbitrary and capricious or an abuse of discretion due to a lack of assurance of BMP implementation.