
IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 20-000123

CHESAPLAIN LAKE WATCH,
Plaintiff-Appellee-Cross Appellant,

and

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

v

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION
Consolidated Case Nos. 66-CV-2020 and 73-CV-2020

BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.,
Defendant-Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

UNITED STATES STATUTES

OTHER PROVISIONS

STATEMENT OF JURSIDICTION

The issues in this dispute rise out of the federal Clean Water Act § 303(d) ("CWA"), meaning the United States District Court for the District of New Union had proper federal question jurisdiction. 28 U.S.C § 1331. Further, the United States Court of Appeals for the Twelfth Circuit has jurisdiction over all claims on appeal from the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the EPA's determination to reject the State of New Union's TMDL in favor of its own is ripe for judicial review when further administrative action needed to take place before the TMDL's effectiveness could be calculated.

II. Whether the EPA's rejection of New Union's TMDL is contrary to law because section 303(d) of the CWA does not explicitly state a TMDL must include WLAs and LAs.

III. Whether the word "daily" in "total maximum daily load" should be interpreted in the literal sense as meaning "every day" or broadly to account for seasonal pollutant variations.

IV. Whether the EPA abused its discretion or acted arbitrarily and capriciously in deciding to credit non-point sources for using use BMPs as a means of reducing the amount of WLAs for point sources.

STANDARD OF REVIEW

When an appellate court reviews a lower court's decision regarding summary judgment, the court applies a *de novo* standard of review. *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015). This standard allows the appellate court to review all matters of law *de novo*, bound only by Federal Rule of Civil Procedure Rule 56. *City of Kennett, Missouri, v. Environmental Protection Agency*, 887 F.3d 424, 430 (8th Cir. 2019); Fed. R. Civ. P. 56. In turn, F.R.C.P. 56 states that summary judgment is appropriate only if "the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56. Thus, this court must apply the relevant law without regard to the lower court's holding.

Notwithstanding the *do novo* standard, since all issues in this matter arise out of an agency action, this court must also view the matter through the lens of an arbitrary and capricious standard. *Howmet Corp. v. E.P.A.*, 614 F.3d 544, 549 (D.C. Cir. 2010) (applying both the *de novo* and arbitrary and capricious standards when reviewing the EPA's actions). To apply this standard, the appellate court "shall…determine the meaning or applicability of the terms of an agency action…and set aside [that] agency action [only] if the action is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…'" 5 U.S.C. § 706(2)(A). In making that decision, the court must accord an agency's interpretation of its own regulation a "high level of deference," only rejecting the interpretation it if it is "plainly wrong." *Howmet*, 614 F.3d at 549. Thus, this Court should apply the established law to this case without regard to the lower court's decision and should only set aside the EPA's decisions and interpretations if those actions are found to be arbitrary and capricious.

STATEMENT OF THE CASE

I. Statement of Facts

Lake Chesaplain is a Class AA[1] body of water, located entirely within the State of New Union, that connects to the Union River on the north-side and outlets to the Chesaplain River. R. at 7. Starting around the 1990s, Lake Chesaplain's water quality began to diminish due to a variety of factors. *Id*. First came the industrial factors, including ten large-scale hog production facilities ("CAFOs") along the Union River and a slaughterhouse on the north side of Lake Chesaplain in

[1] A designation of Class AA means the body of water is of the highest quality within the state. R. at 8.

Chesaplain Mills. *Id*. Then came a massive influx of second home construction on and near the eastern lakeshore. *Id*.

The slaughterhouse was issued a National Pollutant Discharge Elimination System ("NPDES") permit by the State of New Union, which authorized a direct discharge of pollution into the Union River. *Id*. Although the homes on the eastside of the lake have septic systems and are not subject to CWA permits, the City of Chesaplain Mills has a sewage treatment plant that directly discharged into Lake Chesaplain, which was regulated through a CWA permit. *Id*. The hog CAFOs were defined as "non-discharging" point sources, so they were not subject to CWA permits. *Id.* Instead, they were regulated by and subject to permits under a New Union statute that allows the New Union Agricultural Commission to apply the liquid manure to fields nearby. *Id*.

In 2008, New Union commissioned a Lake Chesaplain study to evaluate the declining water quality. R. at 8. In 2012, the Chesaplain Commission issued a report that revealed there were large amounts of algae in Lake Chesaplain, caused by extreme amounts of phosphorus in the water. *Id*. In response to this report, in 2014 the New Union Division of Fisheries and Environmental Control ("the DOFEC") developed a water quality criteria for Class AA bodies of water to have a phosphorous level not exceeding 0.014 mg/l. *Id*. Since the phosphorous level in Lake Chesaplain was around 0.034 mg/l, the DOFEC determined this standard was not being met and put Lake Chesaplain on the list of impaired waters, which was submitted to the EPA the same year. *Id*.

The DOFEC did not include a Total Maximum Daily Load ("TMDL") in the initial submission to the EPA, but the EPA did not object. *Id*. However, the Chesaplain Lake Watch ("CLW"), an environmental organization, notified both the State of New Union and the EPA that CLW would sue if a TMDL was not established. Consequently, the DOFEC began to develop a TMDL. *Id*. Ultimately, the loadings were calculated as follows:

Point Sources:

Chesaplain Mills STP	23.4
Chesaplain Slaughterhouse	38.5

Nonpoint Sources

CAFO Manure Spreading	54.9
Other agricultural sources	19.3
Septic tank inputs	11.6

Natural Sources	32.3

Id. In total, the loadings equaled 180 mt, but the DOFEC found that the main sources of phosphorous loadings were coming from the hog CAFOs because their manure spreading was spreading into the lake. R. at 9. In October 2017, the DOFEC publicly noticed a proposal to implement a TMDL that would phase the reduction in phosphorous discharges in increments of 7% from 180 mt over a five-year period, starting with 7% and ending with 35%. *Id*. However, there were numerous objections to this proposal. *Id*. In particular, the slaughterhouse and Chesaplain Mills objected to this treatment on the grounds that the proposed Best Management Practices ("BMPs") treatment for manure spreading, other agricultural treatment, and septic tanks were insufficient to achieve a 35% reduction. *Id*. In addition, the hog CAFOs objected stating New Union lacked statutory authority to impose BMPs on nonpoint sources. R. at 10. The DOFEC sided with the hog CAFOs and adopted a TMDL that started at a 120 mt, still reduced in 7% increments, but that did not include WLAs ("WLAs") or LAs ("LAs"). *Id*. Consequently, the EPA rejected this TMDL and adopted the DOFEC's original TMDL and included the necessary WLAs and LAs. *Id*.

Since the EPA's adoption of the proper TMDL, New Union has taken no steps to improve the water quality of Lake Chesaplain. R. at 10. Consequently, Lake Chesaplain waters continue to violate the water quality standards set out in the Clean Water Act ("the CWA"). *Id*.

II. Procedural History

This is an appeal from multiple summary judgment motions out of the United States District Court for the District of New Union. This case was originally two separate actions but has since been consolidated into one case consisting of three parties: Chesaplain Lake Watch (hereafter, "CLW"), Plaintiff-Appellant-Cross Appellee; the State of New Union (hereafter, "New Union"), Plaintiff-Appellee-Cross Appellee; and the United States Environmental Protection Agency (hereafter, "the EPA"), Defendant-Appellant. R. at 2.

CLW commenced this action alleging that the excessive pollution in Lake Chesaplain prohibited the members living near or on the lake from enjoying its recreational purposes like swimming, boating, and fishing. R. at 11. CLW further argued that the TMDL proposed by the EPA failed to meet the standards of § 303(d) of the CWA. R. at 11. Additionally, New Union asserted that the EPA wrongfully rejected their TMDL and that the basis of their rejection was contrary to law. The EPA argued that the issues brought by CLW and New Union were not ripe for review. R. at 11. All parties moved for summary judgment and the district court held the following:

(1) The issues were all ripe for review and neither CLW nor New Union would be prejudiced by proceeding with judicial review;
(2) WLAs and LAs were not required to be included in the TMDL, and the EPA's rejection on that ground was contrary to law;
(3) The EPA's TMDL could not take place over a period of five years because "daily" in respect to the TMDL does not mean annual limits but instead daily limits;
(4) The EPA's decision to use nonpoint source BMPs to offset point source reductions was not arbitrary and capricious.

R. at 12-16. CLW and the EPA appealed the district court decision was appealed resulting in the current action. R. at 2. This Court has certified four issues for review. *Id.*

SUMMARY OF THE ARGUMENT

The CWA is a comprehensive water quality statute enacted by Congress with the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (plurality opinion) (quoting 33 U.S.C. § 1251(a)). To achieve that goal, state and federal governments must work together. *Ohio Valley Env't Coal., Inc. v. McCarthy*, No. CV 3:15-0271, 2016 WL 4744164 *2 (S.D.W. Va. 2016). One of the key elements of this cooperation is establishing effective TMDLs,[2] which are used as a tool for reducing and eliminating pollutants by limiting the total amount of pollutants allowed in the waterbody. *Farm Bureau*, 792 F.3d at 287. While the states propose the initial TMDLs, the EPA has complete discretion to approve or deny a TMDL. *Muszynski* 268 F.3d at 94-95. Further, the EPA must approve a TMDL before it can be implemented. *Id.* If the EPA rejects the TDML, the agency may promulgate its own. *Id.* That is precisely what happened in this case when the EPA denied the proposed TMDL and elected to adopt the DOFEC's original with the addition of WLAs and LAs. R. at 10.

Adjudication of the EPA's decision to reject New Union's proposed TMDL and adopt its own TMDL would be unconstitutional because an analysis of the three ripeness factors adopted in *Ohio Forestry Ass'n* demonstrate the matter is not ripe for judicial review. The first factor is whether delayed review will cause hardship to the plaintiffs. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, (1998). The only hardship New Union and CLW might face is a timing

[2] TMDLs are introduced when a state's water quality standards, which are governed by the EPA, are not met. *Natural Resources Defense Council, Inc. v. Muszynski* 268 F.3d 91, 94-95 (2d Cir. 2001). When that occurs, the state is required to adopt use-based water quality standards and rank their waters by priority before establishing TMDLs for any pollutants listed by the EPA and present in the priority waters. *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 287 (3d Cir. 2015). In this case, the priority body of water is Lake Chesaplain and the listed pollutant is phosphorus. R. at 6.

inconvenience since it is not clear when, or even if, New Union will have to modify NPDES permits or implement BMPs. The second factor is whether judicial intervention will interfere with further administrative action. *Id.* This factor weighs heavily against ripeness because the TMDL adoption process is not complete. The effectiveness of the TMDL can only be measured after BMPs are implemented or NPDES permits are modified. The EPA is still working to finalize the disputed TMDL. Until that limit is finalized, any judicial intervention would be premature. The third factor is if courts would benefit from further factual development of the issues. *Id*. Given the EPA is still in the process of finalizing the disputed TMDL, data and research are still being reviewed to ensure the EPA's adopted TMDL is the most effective way to address the phosphorus levels in Lake Chesaplain. New Union and CLW's disputes are premature as they could still be addressed before New Union would be required to implement the TMDL. Postponing review to allow the EPA time to address these problems through the established process would provide ample factual development of the disputed issues. Not to mention that the disputes could be resolved altogether and save the Court valuable time and resources. Altogether, the ripeness factors indicate that this case is not yet ripe for judicial review.

WLAs and LAs are a necessary component of a TMDL. The EPA, therefore, properly rejected New Union's proposed TMDL as it failed to include those allocations. This issue is simply one of statutory interpretation. Congress has made it clear that WLAs and LAs are needed for a TMDL. *See generally* Water Quality Planning and Management ("WQPM"), 50 Fed. Reg. 1774-01 (1985). But even if the court determines Congressional authority is not clear, a *Chevron* analysis demonstrates that the EPA's interpretation, and thereby rejection of New Union's TMDL, is correct. According to *Chevron*, if Congress has spoken on the issue, then the analysis stops there. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Although Congress

did not explicitly state the necessity of WLAs and LAs in the CWA, Federal Register Chapter 50 § 1774-01 does note the necessity of WLAs and LAs in establishing a proper TMDL. WQPM, 50 Fed. Reg. 1774-01. Nevertheless, even if this Court finds the matter remains ambiguous, the EPA's interpretation that these allocations are required is owed deference. *Ohio Forestry Ass'n*, 523 U.S. at 733. It is entirely permissible that the term "total maximum daily load" should be interpreted to include both WLAs and LAs in order to properly encompass the Congressional intent behind "total loads." Therefore, this Court must hold that the EPA properly rejected New Union's proposed TMDL.

Similarly, the EPA's decision to broadly interpret the word "daily" in "total maximum daily load" to include annual limits to be implemented over a period of five years does not violate § 303(d) of the CWA. Again, this issue is simply a matter of statutory interpretation that is owed *Chevron* deference. So, this Court must look to: (1) whether Congress was ambiguous to the issue; and, if so, (2) whether the EPA's interpretation of the issue is an acceptable construction of the statute. *Chevron*, 467 U.S. at 843. As to the first step, § 303(d) is ambiguous since the traditional definition of "daily" is insufficient to deal with complex matters of water quality. Indeed, turning to the second step of interpreting the ambiguous statute, Congress often intentionally leaves ambiguity in these complex areas to allow the EPA to interpret the term using its expertise. See generally *United States v. Mead Corp.*, 533 U.S. 218 (S. Ct. 2001). Further, in interpreting these terms, the EPA is not bound to the dictionary definition that may have a different meaning in the matter being regulated. *Farm Bureau*, 792 F.3d at 294. Given that phosphorous varies seasonally and annually, a literal "daily" load would not be an effective measure of regulating the pollutant. Thus, this Court should find the EPA permissibly interpreted "daily" to include annual limits that accord with the changes in the phosphorus pollutant.

Lastly, the EPA did not abuse its discretion in crediting BMPs for non-point sources as the decision was one based on all relevant factors and was not contrary to law. Courts should not find an agency abused its discretion if the action was intended by Congress or was plausible in light of the agency's expertise. *Natural Resources Defense Council v. United States EPA*, 808 F.3d 556 (2d Cir. 2015) (hereafter, "*NRDC*, 808 F.3d at 556.") First, Congress specifically gave the EPA authority to regulate nonpoint sources under the CWA. *Farm Bureau*, 792 F.3d at 296. Further, based on the EPA's expertise, the agency determined crediting nonpoint sources is a reliable way of reducing overall pollution and achieving the water quality goals of the CWA. Therefore, this decision was not an abuse of discretion. While CLW argues the EPA is subject to the "reasonable assurance" standard, that standard has not been adopted through notice and comment rulemaking and, therefore, is not binding. R. at 16; *United States Steel Corp. v. United States Envtl. Prot. Agency*, 595 F.2d 207, 212 (5th Cir. 1979); *See generally* Administrative Procedures Act ("APA") § 6, 5 U.S.C. §§§ 551-53. Thus, this Court should agree with the lower court in finding the EPA did not abuse its discretion, nor was it arbitrary and capricious, in deciding to credit non-point sources for using BMPs pollution reductions to reduce the amount of WLAs for point sources.

For the aforementioned reasons, this Court should reverse the decision of the district court regarding issues I, II, and III, and affirm the ruling on issue IV.

ARGUMENT

I. THE EPA'S DETERMINATION TO REJECT THE NEW UNION WATERSHED PHOSPHOROUS TMDL AND ADOPT ITS OWN IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE FURTHER ADMINISTRATIVE ACTION IS NEEDED.

The EPA's decision to adopt its own phosphorous TMDL and discard New Union's TMDL is not yet ripe for review. Due to the immediate judicial action, the EPA has not yet had the opportunity to make the necessary modifications to NPDES permits or BMPs requirements.

The Supreme Court has noted that the ripeness doctrine attempts to provide an agency with the "greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying 'ripeness' and 'exhaustion' exceptions case by case." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13, (2000). The Court has also stated that to determine whether an agency's decision is ripe for judicial review, court needs to examine "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry Ass'n*, 523 U.S. at 733. To further analyze these issues, the Supreme Court established three factors: "(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." *Id.* Postponing judicial intervention would not cause hardship to New Union and CLW; would prevent interference with further administrative actions; and would benefit the courts with further factual development of the TDML's appropriateness. Therefore, this Court should find the ripeness factors indicate this matter is not ripe for review.

A. Postponing Review Until After the TMDL Goes into Effect would not Cause Hardship to CLW or New Union.

Although the TMDL in question does require specific NPDES permit limits that New Union will be required to implement, the Plaintiffs would not suffer financially. Further, they would only potentially suffer a small inconvenience by not knowing the exact time as to when they would modify the permit limits or implement BMPs. The hardship factor considers both how the parties would suffer financially and the level of uncertainty present absent the judicial review. *City of Kennett*, 887 F.3d at 434. In addition, hardship does not mean something that makes life harder, but instead means "hardship of a legal kind, or something that imposes a 'significant practical harm' upon the plaintiff." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009). In *Colwell*, the plaintiff's claims did not rise to a "significant practical harm," and thus were not ripe for review, because they did not demonstrate any harm suffered was "immediate, direct, and significant." *Colwell*, 558 F.3d at 1129. The plaintiffs also failed to demonstrate that their level of hardship would outweigh the agency's interest in delaying review. *Id*. Because of these factors, the court dismissed the case for lack of ripeness. *Id*. at 1130.

Importantly, even if this Court does find a "significant practical harm," hardship is only one of the factors the court may consider when making their determination. *Ohio Forestry Ass'n*, 523 U.S. at 733. Therefore, regardless of any harm, the ripeness doctrine still requires the Court to take all three factors into consideration. *Id.*

Here, CLW and New Union do not state anywhere in the record that they would be burdened financially, nor can they prove that postponing this case would cause them financial hardship. The only potential burden New Union may suffer is minor inconvenience because they would not know the exact time they would need to modify the NPDES permit limits or implement BMPs requirements. But, similar to the plaintiffs in *Colwell*, this timing inconvenience is certainly

not one that raises to the standard of "significant practical harm" since the record is void of any alleged immediate or direct harm. New Union also fails to state how their hardship is greater than the EPA's interest in delaying review to complete the administrative duties assigned to the agency by Congress pursuant to the CWA. New Union modifying the NPDES permit or implementing BMPs is not even a question of "when" but is instead a question of "if" because any potential inconveniences are dependent on administrative actions that have no even been taken, and New Union is not required to implement or modify anything at this point in time.

Alternatively, even if this court is convinced that the uncertainty of the timing is an inconvenience so great that New Union would be significantly burdened, this is only one of the factors the court must consider when making their determination. Therefore, this court would still need to analyze the second and third ripeness factors.

B. Premature Judicial Intervention Would Interfere with Further Important Administrative Action.

Allowing this case to proceed in the court system would interfere with the final step of the TMDL development process and ultimately hinder the EPA conducting important administrative actions. All administrative actions must be completed before judicial action can be taken. *Ohio Forestry Ass'n*, 523 U.S. at 733. Further, the effects of the final administrative decision must be felt in a concrete way by the parties challenging the decision. *Id.*

Specific to the CWA, § 303(e) sets out the process to which a TMDL is approved.[3] When these steps are completed, administrative action is also complete. EPA, GUIDANCE DOCUMENT (1991). According to § 303(e), the final steps of the TMDL process are as follows:

[3] *See* EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991) (EPA authorized guidance document interpreting CWA § 303(d) to explain the TMDL process and describe the necessary steps for completing a TDML) (hereafter "EPA, GUIDANCE DOCUMENT (1991)"); *see generally* CWA § 303(d).

(1) determine if the TMDL acceptable to the EPA,

(2) if no, the EPA adopts its own TMDL, makes the changes necessary, issues a public notice, and sends the new TMDL to the state, and

(3) the state includes the EPA approved TMDL in NPDES permits, BMPs controls, etc, all of which are established in cooperation with the EPA.

Id. (interpreting CWA § 303(e)).

If all administrative actions have not been taken before judicial intervention, the judicial decision could impede on the agency's system and policies set out by Congress. *Ohio Forestry Ass'n*, 523 U.S. at 733. In *Ohio Forestry Ass'n*, the Supreme Court analyzed the ripeness doctrine and its factors through the lens of a dispute between the United States Forestry Service and the Sierra Club. *Id.* For the second factor in particular, the Court held that judicial intervention would "hinder the agency [in] refin[ing] its policies" by potentially making decisions that would be inconsistent with the original plan, or through making decisions that would interfere with the system Congress set out for the agency. *Id.* at 736. The Court ultimately determined the case was not ripe for review and that the agency needed to take more administrative action before the lawsuit could proceed within the court system. *Id.* at 738.

Here, like in *Ohio Forestry Ass'n*, there is additional administrative action that needs to take place for the case to be considered ripe for judicial review. In *Ohio Forestry Ass'n*, the Court reasoned that deciding the case would potentially hinder the agency's plan and the process developed by Congress. Similarly, judicial intervention in this matter would hinder the process Congress outlined in the CWA regarding TMDL approval. The final step of establishing a TMDL requires states to take the TMDL approved by the EPA and incorporate it into NPDES permits and BMPs measures in cooperation with the EPA. New Union taken neither of these steps and instead

argues that the mere development of the Lake Chesaplain TMDL allows for judicial action. However, since the NPDES permits and BMPs measures have not been evaluated, the TMDL process is not complete.

Although issuing NPDES permits and implementing BMPs measures are New Union's responsibility, the EPA is still involved through a cooperative effort. So, all administrative actions have not been fully exhausted. New Union should be required to take the steps to finalize the NPDES permits and BMPs measures in accordance with the EPA's TMDL and work with the EPA regarding any issues. Because New Union failed to do this, allowing this matter to proceed would allow judicial intervention before the completion of the TMDL process outlined by Congress. This court, like the Supreme Court did in *Ohio Forestry Ass'n*, should find this case is not ripe for review since judicial intervention would potentially hamper the methodology and TMDL process set out by Congress in the CWA.

C. Allowing the TDMLs to go into Effect would Benefit the Court with Further Factual Development of the Issues.

The issues presented in this case all center around the development, finalization, and implementation of the Lake Chesaplain TMDL. Since the TMDL that New Union developed did not meet the water quality standards of the CWA, the EPA, pursuant to the TMDL development process, created their own TMDL and implementation plan to reduce the pollution in Lake Chesaplain. However, New Union brought this action before the TMDL process was complete. The issues raised in this matter could resolve themselves if further fact-dependent actions, such as modifying NPDES permits and implementing BMPs measures, are taken. For instance, since all of the issues center around the Lake Chesaplain TMDL, if the TMDL is found to effectively improve the water quality of the lake then the issues will resolve themselves. Either way, it is

entirely likely the court will not need to intervene. However, the EPA cannot know this unless the court delays intervention to allow fact-determinative actions to occur.

Further, the judicial system as a whole could benefit from postponing review by setting precedent that prevents parties from bringing action prior to the finalization of a TMDL. Otherwise, courts will be tasked with trying to determine which administrative action should be taken before the process is complete and all facts are present. The decision the court comes up with could be unnecessary if the decision is resolved within the final steps of an administrative process.

Since CLW and New Union will not suffer any hardship so great that it would burden them significantly; judicial intervention will prohibit further administrative action; and courts will benefit from further factual development like modification of NPDES permits or implementing BMPs — all three ripeness factors indicate this matter is not ready for judicial review. Therefore, this case should be dismissed as it is not ripe for adjudication.

II. NEW UNION's TMDL FAILED TO INCLUDE WLAs AND LAs, WHICH ARE NEEDED TO ESTABLISH A PROPER TMDL.

The EPA rejected New Union's 2018 TMDL because they failed to include WLAs and LAs within the proposal. New Union argues that, because CWA § 303(d) does not explicitly state that WLAs and LAs are required, the EPA's rejection of their TMDL on these grounds is contrary to law. To resolve this dispute this Court should conduct a *Chevron* analysis. According to *Chevron*, when a court is having to review an agency's construction of a statute it administers, there are two steps the court must take. *Chevron*, 467 U.S. at 843. First, the court must determine if Congress has spoken on the issue. *Id.* If the Congressional intent of is clear, the court goes no further. *Id.* If Congressional intent is not clear, the second *Chevron* step guides that court does not simply make up its own interpretation, but evaluates whether the agency's decision is based on

acceptable construction of the statute. *Id*. In this case, a *Chevron* analysis demonstrates the EPA appropriately determined WLAs and LAs are needed for a complete calculation of a TMDL.

A. Congress Intended WLAs and LAs to be Included in TMDLs

This court need not go past the first step of the Chevron analysis since Congress has spoken directly to whether WLAs and LAs need to be included to properly establish a TMDL. Both the CWA and Federal Regulations include WLAs and LAs within their interpretation of "total maximum daily load," making this issue nothing more than a mere matter of basic statutory interpretation.

In chapter 50 § 1774 of the Federal Register, the EPA established the final rules and regulations that would make it easier for the States to uphold proper water quality standards. WQPM, 50 Fed. Reg. 01,1774. Regarding TMDLs, the regulations explicitly state:

> "Although section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated. Thus, it is necessary for EPA to review and approve or disapprove a TMDL in conjunction with component WLAs and LAs."

Id. at 1775. Additionally, the TMDL guide established by the EPA contains similar language, stating that WLAs and LAs are both necessary components of a TMDL. EPA, GUIDANCE DOCUMENT (1991).

Established law and the EPA have made it plainly clear numerous times that WLAs and LAs must be included in a TMDL calculation for a proper evaluation of the TMDL. The EPA's decision to reject New Union's 2018 TMDL for failure to include WLAs and LAs cannot be contrary to law when the law clearly states both allocations are necessary components of the computation and interpretation of "total maximum daily load." However, even if this court feels

the need to go further, the EPA's interpretation of "total maximum daily load" is based on an acceptable construction of the CWA.

B. The Plain Meaning of the Word "Total" in and of itself Proves WLAs and LAs are Needed in a TMDL.

"Total" in "total maximum daily load" insinuates that all possible allocations need to be included in the TMDL calculation for there to be a complete analysis. The word "total" is defined as "comprising or constituting a whole; entire, absolute, utter, involving a complete effort." MERRIAM-WEBSTER DICTIONARY, Total, retrieved Nov. 14, 2021., from https://www.merriam-webster.com/dictionary/total. The second step of Chevron guides that when trying to resolve a conflict involving statutory interpretation of an agency decision, the Court owes that agency deference as to their decision. *Chevron*, 467 U.S. at 844. "[The Supreme Court] ha[s] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* Therefore, the EPA's decision that the term "total" includes WLAs and LAs must be given deference.

Given the clear definition, certainly "total maximum daily load" is intended to include all loads, meaning that WLAs and LAs need to be included for a full evaluation of a TMDL. Thus, the EPA's interpretation is based on a permissible construction of the statute and must be given deference. Since New Union failed to provide those allocations required for a proper TMDL, the EPA's rejection of New Union's 2018 TMDL was proper.

III. THE EPA's INTERPRITATION OF DAILY TO ALLOW THE TMDL TO BE MEASURED BY ANNUAL LIMITS IS PROPER AND DOES NOT VIOLATE § 303(d) OF THE CLEAN WATER ACT.

The EPA has appropriately interpreted the term daily in the context of TMDLs to allow for annual and seasonal variations. However, CLW argues that the word "daily" should be interpreted

in the literal sense, meaning "every day." When there are competing interpretations of a statue, the Court must perform a *Chevron* analysis. *Chevron*, 467 U.S. at 843. As stated above, *Chevron* is broken down into two steps. *Id.* First, the court must determine if Congress has spoken on the issue. *Id.* Then, only if Congressional intent is not clear, the court evaluates whether the agency's interpretation is based on an acceptable construction of the statute. *Id*.

The statute here, CWA § 303(d), is ambiguous because "daily" is not sufficiently clear or capable of encompassing the complex issue of water quality. Therefore, this Court must evaluate the EPA's interpretation, but only to determine if the agency's interpretation is an acceptable construction of the statute. The EPA's interpretation is based on the agency's expertise in regulating pollutants such as phosphorus and seeks to achieve the overall goals of the CWA. The interpretation is, therefore, an acceptable construction of the statute.

A. The CWA was Intended to be Ambiguous as to the Meaning of the Term "Daily" to Allow the EPA to Interpret the Statute.

To begin a *Chevron* analysis, the court must first look to the disputed statute to see whether there is clear congressional intent. The section at issue here is § 303(d) of the CWA, which requires states to develop lists of threatened waters and to "calculate and allocate pollutant reduction levels necessary to meet approved water quality standards." 33 U.S.C. § 1313(d)(1)(C). Specifically, the Act states that:

> "[e]ach State shall establish [a list of impaired] waters…and in accordance with the priority ranking, total maximum ***daily*** loads for [the] pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. 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. (emphasis added).

The dispute here concerns whether "daily" should be interpreted in the traditional sense or to allow for annual limits. The basic dictionary definition of "daily" is "occurring, made, or acted upon every day." MERRIAM-WEBSTER DICTIONARY, Daily, https://www.merriam-webster.com/dictionary/daily (last visited Nov. 15, 2021). However, courts are not bound by the dictionary definition of terms that may have a different meaning within the subject. *Farm Bureau*, 792 F.3d at 294. In some cases, Congress even intentionally uses ambiguous terms in order to assign the duty of interpretation to the agency. *Id.* (citing *Mead Corp.*, 533 U.S. at 218). Accordingly, courts have held that "daily," within the context of TMDLs, is susceptible to a broader range of meanings. See generally *Muszynski*, 268 F.3d at 91. Given this ambiguity, it is clear Congress has not directly spoken to this issue, but rather left it to the EPA to interpret based on the agency's expertise. Therefore, this Court should proceed to the second step of *Chevron*.

B. The EPA's Interpretation of Allowing "Daily" to Include Annual Limits is an Acceptable Construction of the Statute.

"The sole question for the Court under Chevron step two is: 'whether the agency's answer is based on a permissible construction of the statute.'" *Chevron*, 467 U.S. at 843. In *Chevron*, the Supreme Court recognized that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly[,] by Congress." *Id.* at 844. Mere, ordinary, general knowledge may be insufficient to formulate an agency's regulations, so the agency can fill the gaps most sufficiently. *Id*.

The EPA's interpretation of "daily" loads is no new issue to the judicial system. In *Muszynski*, the Second Circuit rejected the plaintiff's argument that the TMDLs accepted by the EPA violated the CWA because the "daily" loads were "presented in terms of annual maximum loads of phosphorus, not daily loads." *Muszynski*, 268 F.3d at 91. The EPA argued that the silence

within the statute regarding the "terms of units" to be used in TMDLs supported the EPA's approval of the TMDL in question. *Id.* The Second Circuit agreed with the EPA and reasoned that the term "total maximum daily load is susceptible to a broader range of meaning[s]." *Id.* The court further directed that the agency charged with enforcing these statutes is best suited to interpret the meaning of the statute. *Id*. at 98. The court reasoned that, since some levels of phosphorus vary seasonally and annually, it should be measured in that respect. *Id*. at 99.

The Second Circuit is not alone in abandoning this narrow interpretation of the term "daily" loads. The Third Circuit has recognized that the TMDL statute is silent on "whether another timeframe may be used when [that timeframe] is more appropriate for the particular pollutant at issue." *Farm Bureau*, 792 F.3d at 296 (quoting *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp 2d 210, 245 (D.D.C. 2011)). Further, even the D.C. Circuit has moved away from the narrow interpretation of "daily" after its restrictive 2006 holding. *See generally Anacostia*, 798 F. Supp. 2d at 210 (holding that "the proposed TMDLs meet the requirement[s] to consider the critical environmental conditions" and "seasonal environmental variations") (*Contra Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006)).

This Court should follow this trend of permitting TMDLs to be expressed in loads measured by a time other than the traditional definition of "daily." In *Muszynski*, the court took scientific data and differences in pollutants into account when evaluating the EPA's interpretation of the best way to regulate phosphorus levels. Given this Court is conducting the same analysis regarding the EPA's regulation of phosphorus levels in Lake Chesaplain, this Court should follow the Second Circuits precedent. In doing so, it becomes abundantly clear that the the term "daily" must be interpreted broadly when regulating pollutant levels that, like phosphorus, vary seasonally and annually.

IV. THE EPA's USE OF A CREDIT FOR ANTICIPATED BMPs POLLUTION REDUCTIONS WAS VALID PURSUANT TO THE EPA'S AUTHORITY TO REDUCE THE STRINGENCY OF THE WLAs.

The EPA had a reasonable basis for deciding to credit nonpoint sources to offset and reduce the stringency of the point sources and. A court may only set aside an agency's decision if it finds that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nw. Envtl. Advocates v. United States EPA*, 855 F. Supp. 2d 1199, 1204 (D. Or. 2012). An agency is found to have acted arbitrarily and capriciously when it "failed to consider an important aspect" of the matter and chose to use a standard "too imprecise to guarantee compliance with water quality standards." *Natural Resources Defense Council*, 808 F.3d at 570.

CLW argues the EPA was arbitrary and capricious because it failed to satisfy the "reasonable assurance" standard in proposing a TMDL that depended on crediting nonpoint sources. R. at 15-16. However, agency rules, such as controlling standards, must be subject to notice and comment rulemaking to be binding. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019). If the rule, in this case a standard, has not been subject to notice and comment rulemaking, the court is not bound to follow the rule or standard. *Id.*

This Court should affirm the district court's order granting summary judgment because the EPA did not act arbitrarily or capriciously in deciding to credit non-point source BMPs to reduce the stringency of the WLAs in point sources. In coming to this determination, the EPA relied on scientific data, considered all relevant factors, and acted within the scope of authority authorized by Congress. Lastly, the "reasonable assurance" standard relied on by CLW is nothing more than a suggestion by the EPA and is not binding on the organization or this Court. Therefore, the EPA's decision to credit nonpoint sources was neither arbitrary and capricious nor an abuse of discretion.

A. The EPA Considered All Relevant Factors and Appropriately Determined to Credit Non-Point Sources to Achieve Water Quality Standards.

The EPA acted well within its authority granted by Congress and considered scientific data when it made its decision to reduce the stringency of WLAs by allowing credit for BMPs for nonpoint sources. To determine whether an agency acted arbitrarily and capriciously, the court looks to whether the agency failed to consider the "relevant factors" and if a "clear error of judgment was made." *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 80 (4th Cir. 2020). In coming to this determination, the court should not use its opinion as a substitute of the agency's judgment. *Id.* Specifically, courts should only find the action arbitrary and capricious if the agency "relied on factors which Congress had not intended it to consider…or [the decision] [wa]s so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *NRDC*, 808 F.3d at 569. Alternatively, where the agency relied on "relevant data and provided and explanation" which rationalizes its decision, the court gives that decision deference. *Friends of Buckingham*, 947 F.3d at 80-81. The EPA's action in this matter was not arbitrary and capricious since that decision was well within Congressional expectations, based on relevant factors, and accompanied by a reasonable explanation.

1. The EPA's Decision to Credit Nonpoint Sources is Authorized by Congress.

The Supreme Court has long recognized that the CWA is a comprehensive water quality statute enacted by Congress with an objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Rapanos*, 547 U.S. at 759 (quoting 33 U.S.C. § 1251(a)). To accomplish this purpose, the CWA requires states and the federal government to work together towards the goal of eliminating water pollution. *Ohio Valley*, 2016 WL 4744164 *2. To achieve that goal, the CWA authorizes the EPA to regulate both point sources and non-point sources. *Farm Bureau*, 792 F.3d at 296. Specifically, Congress granted the EPA authority to

suggest nonpoint source BMPs as an offset to point source reductions to achieve water quality standards. *Id.* at 289. The only distinction in regulating the sources is that EPA is not authorized to control non-point discharges in a permitting process. *Id.*

The CWA charges the EPA with an overall goal of reducing and eliminating pollutants from the Nations' waters. The EPA's action in this case was done just for that purpose. Since the EPA has authority to suggest nonpoint source BMPs as an offset to point source reductions to achieve water quality standards, this Court should also recognize the EPA's authority to credit nonpoint sources for using BMPs.

The utmost important goal of the CWA is improving water quality, which is exactly what the EPA sought to do when it reduced the stringency of WLAs by allowing credit for BMPs for nonpoint sources. Afterall, according to the EPA, non-point sources are the leading remaining cause of water quality problems. EPA, BASIC INFORMATION ABOUT NONPOINT SOURCE (NPS) POLLUTION, Overview, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Nov. 21, 2021). If the EPA had done anything opposite of striving to achieve the goals of the CWA, this Court could find that the EPA was arbitrary and capricious in its decision. But because there is no indication that the EPA acted in a way contrary to the goals of the CWA, this Court should find that the EPA was within its congressional authority and correctly allowed credit for nonpoint source BMPs.

2. The EPA's Decision to Regulate Nonpoint Sources was Based on Relevant Data and the EPA Provided a Rational Explanation for that Decision.

When the EPA fails to consider important information that could have resulted in a different, better outcome that is consistent with the CWA, the court will find that the EPA acted arbitrarily and capriciously. *NRDC*, 808 F.3d at 556. In *NRDC* the Natural Resources Defense Council ("NRDC") sued the EPA, alleging that the EPA was arbitrary and capricious when it

issued a permit to regulate the discharge of chemicals from ships. *Id.* at 562. NRDC argued that, since the permit would not comply with water quality standards, it was inconsistent with the CWA. *Id.* at 563. Specifically, the EPA failed to include technology that could have been used to improve water quality standards. *Id.* at 572. The court held that the EPA's action was arbitrary and capricious because it failed to consider the technology with the greatest reductions of pollutions and the most economically feasible option. *Id.* at 575. In coming to this decision, the court reasoned that an agency acts arbitrarily and capriciously when it "fails to consider an important aspect" and chooses to use a standard "too imprecise to guarantee compliance with water quality standards." *Id.* at 570.

Here, the EPA relied on scientific reports and considered the public commentary when making its decision to adopt the Chesaplain Watershed Implementation Plan ("CWIP"). Therefore, the agency did not act arbitrarily nor capriciously. R. at 10. This differs from *NRDC*, where the EPA failed to include relevant data that would have improved water quality standards. In this case, the EPA took the necessary steps to begin addressing the phosphorus issue because the water quality in Lake Chesaplain was not being properly addressed. *Id.* at 7. The court in *NRDC* held that the EPA acted arbitrarily and capriciously when it did not consider an important aspect in making its decision. This Court should find the exact opposite here since the EPA considered the utmost important aspect in making its decision: improving water quality. R at 15.

Furthermore, this case differs from *NRDC* where the EPA chose a standard "too imprecise to guarantee compliance with water quality standards," which is not the issue in this case. Therefore, because the EPA relied on relevant data and used its power granted by Congress to achieve its goal, this Court should find that the EPA was not arbitrary and capricious in its decision.

B. The "Reasonable Assurance" Standard for has not been Adopted by the EPA and should not be Applied by this Court.

CLW's allegation that the EPA acted arbitrarily and capriciously in crediting nonpoint sources also fails because it relies solely on the argument that the EPA failed to meet the reasonable assurance standard. This standard requires that when TMDLs "developed for waters impaired by both point and nonpoint sources, and the WLA is based on an assumption that nonpoint source load reductions will occur, the TMDL must provide 'reasonable assurances' that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable." U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 1, PHOSPHORUS TMDLS FOR VERMONT SEGMENTS OF LAKE CHAMPLAIN 49 (2016).

Before the EPA can adopt a rule, such as a standard of assurance, the APA requires the EPA "to give notice and receive pre-promulgation comments from interested parties." *Steel Corp.*, 595 F.2d at 212; APA § 6, 5 U.S.C. §§§ 551-53. Rules that were not subject to notice and comment rulemaking are not binding. See *Kisor*, 139 S. Ct. at 2434 (stating "Congress's specification in the APA of procedures for the creation of new substantive rules (like notice and comment) necessarily implies that an agency cannot amend a substantive rule without following those procedures.")

If the reasonable assurance standard was applied, the EPA would be responsible for guaranteeing New Union's compliance and implementation of the BMPs in the CWIP. However, as the district court correctly pointed out, Section 303(e) does not authorize the EPA to establish or otherwise take over TMDL implementation plans. R. at 16. Further, since nonpoint sources are not regulated for a permit process, Congress specifically granted the states sole authority implement water quality standards when nonpoint sources are involved. *Envtl. Advocates*, 855 F. Supp. 2d at 1208.

The reasonable assurance standard has never been adopted by the EPA. In fact, the standard is taken solely from an EPA guidance document that has not been subject to notice and comment rulemaking. The guidance document specifically states, "[t]his document provides guidance only. It does not establish or affect legal rights or obligations…" EPA, GUIDANCE DOCUMENT (1991). Because "reasonable assurance" is not the applicable standard, it should simply be treated as a guideline, rather than a rule. The reasonable assurance standard is further inapplicable since the EPA cannot be charged with ensuring nonpoint source TDMLs are implemented. That duty is left to the states alone. Therefore, this proposed nonpoint source TDML is merely informational tool to be used by the states in acting on their responsibility to implement BMPs.

Since the reasonable assurance standard does not apply, this Court should instead look at the well-established standards for determining whether an EPA action was arbitrary and capricious. As discussed above, the EPA's decision to credit nonpoint sources had a rational basis that considered all relevant factors and was within the scope congressional authority. Therefore, this Court should affirm the district court in finding the EPA's action was neither arbitrary and capricious nor an abuse of discretion.

CONCLUSION

First, this case is not ripe for review. Each of the Supreme Court's *Ohio Valley* ripeness factors weigh against a holding of ripeness. Overall, the Plaintiffs' alleged hardship does not rise to the level of a significant practical harm; the EPA needs to take further important administrative actions; and the Court would benefit from further factual development of the case. This court should reverse the lower court and find New Union and CLW should pursue their grievances in the ongoing TMDL process in lieu of the judicial system.

Second, the EPA properly and permissively interpreted TMDLs to require WLAs and LAs. Even if this Court finds Congress did not clearly speak to this issue in the cited sources, the EPA's interpretation is owed deference under *Chevron*. Since the EPA's interpretation is based on the general definition of the term "total," it is Constitutionally permissible. Thus, this Court should give the EPA's interpretation of "total" due deference and reverse the lower court's decision.

Third, the term "daily" in "total maximum daily load" should be interpreted broadly to allow for annual limitations for pollutants, such as phosphorus, with seasonal variables. The traditional definition of "daily" simply does not take into account the complex nature of regulating water pollutants. Congress intended for the EPA to interpret "daily" not by the dictionary definition, but in the context of the agency's environmental expertise. The EPA did just that in determining an annual TDML would be the most effective means of addressing the phosphorus levels in Lake Chesaplain. For that reason, this court should reverse the lower courts decision and allow the EPA to continue addressing this serious environmental issue.

Lastly, the EPA did not abuse its discretion in crediting BMPs for non-point sources to reduce the stringency on point sources. The EPA considered all relevant factors, closely followed Congressional intent, and provided a reasonable explanation before deciding to credit non-point sources for using BMPs. Untimely, the EPA determined this measure was the best method to achieve the goals of the CWA. CLW's only argument that the EPA acted arbitrarily and capriciously relies on alleged noncompliance with a standard that has not been adopted by notice and comment rulemaking and does not bind the agency or this Court. Thus, this court should affirm the lower court in holding that the EPA permissively decided to credit non-point sources.

Altogether, the district court was erroneous in finding that (1) the issues presented by CLW were ripe for judicial review; (2) the EPA's rejection of New Union's TMDL for omitted WLAs

and LAs was contrary to law; and (3) the EPA's adoption of an annual, phased TMDL was a violation of the CWA. Accordingly, this Court should reverse the order granting summary judgment for these issues. In turn, this Court should affirm the order granting summary judgment to the EPA regarding the decision to allow credit for nonpoint source BMPs since such decision was neither an abuse of discretion nor arbitrary or capricious.