

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

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 Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.
Defendant-Appellant

On Appeal from the United States District Court for the District of New Union

Brief of Defendant-Appellant, UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY

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INTRODUCTION

The Clean Water Act (CWA) intends "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). To accomplish this goal, the CWA calls for the creation of Total Maximum Daily Loads (TMDLs). This case is about preserving the integrity of TMDLs such that the purpose of the CWA may be effectively accomplished.

Water quality is a significant challenge that societies face during the 21st century—threatening human health, limiting food production, reducing ecosystem functionality, and hindering economic growth. UNESCO, *The Global Water Quality Challenge & SDGs*, International Initiative on Water Quality, <https://en.unesco.org/waterquality-iiwq/wq-challenge> (last visited Nov. 15, 2021). Water quality degradation translates directly into environmental, social, and economic problems. *Id.* Meanwhile, the forces driving these challenges are accelerating; intensification of agriculture, land-use changes, more variable rainfall patterns, and expanding industrialization continue to grow. The World Bank, *Quality Unknown: The Invisible Water Crisis*, Feature Story (August 20, 2019) <https://www.worldbank.org/en/news/feature/2019/08/20/quality-unknown>.

While declining water quality is an ever-advancing crisis, the costs of water quality management are ever-present. The CWA mandates agencies based on taxpayers' contribution as clean water is considered a public good. Minnesota Pollution Control Agency, *Water Quality Standards: Costs and Benefits*, <https://www.pca.state.mn.us/water/water-quality-standards-costs-and-benefits> (last visited Nov. 15, 2021). The laborious process of mandating and enforcing water quality regulations can rack up a hefty bill for taxpayers. *Id.* New or changing standards also have an economic effect on businesses, homeowners, and local governments subject to water quality regulations. *Id.*

The CWA framework is based on the idea of “cooperative federalism”, which allows the federal EPA to establish national standards that states are then expected to implement through their own regulatory programs. *See New York v. United States*, 505 U.S. 144 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981). The Supreme Court has said that the CWA anticipates a partnership between the states and the federal government, animated by a shared objective: restoring and maintaining the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Most importantly, this framework allows EPA to strike a balance between constituents' economic needs and the protective needs of the environment.

In today’s case, the Chesaplain Watershed Implementation Plan TMDL is a “pollution diet” that identifies the maximum load of phosphorus that Lake Chesaplain may receive while still meeting applicable water quality standards. This “pollution diet” will effectively revive Lake Chesaplain’s water quality while simultaneously allowing for an implementation process that balances the surrounding area’s economic interests.

JURISDICTIONAL STATEMENT

United States Environmental Protection Agency (EPA) appeals from an Opinion and Order granting partial summary judgment for Plaintiff Chesaplain Lake Watch (CLW) and summary judgment for the State of New Union, entered August 15, 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 (consolidated cases). The district court had subject matter jurisdiction over both actions under the judicial review provisions of the Administrative Procedure Act, APA §702, and under 28 U.S.C. § 1331 because the action is provided by federal law. CLW, New Union, and EPA all filed timely Notice of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which

provides "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision and thus [is] appealable. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

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 interpretation of the term "total maximum daily load" in the CWA section 303(d), 33 U.S.C. § 1313(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 section 303(d), 33 U.S.C. § 1313(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 reasonable assurance of BMP implementation.

STATEMENT OF THE CASE

Alongside the State of New Union, EPA has engaged in a decades-long process to develop a plan to improve the water quality of Lake Chesaplain. The natural lake starts at the Union River and spans over a fifty-five-mile long, five-mile-wide area, ending in the Chesaplain

River. Order at 7. The lake is essential to all aspects of life surrounding it. Bounded on the westside by the Chesaplain National Forest and the twenty-mile-long shorefront of Chesaplain State Park, the lake is utilized for recreational purposes such as beaching, fishing, boating, and camping timber production and harvesting. *Id.* On the east side, the lake is bound by a mix of agricultural lands and lakefront vacation communities, and the City of Chesaplain Mills is located at the northernmost point of the lake. *Id.* For a time, Lake Chesaplain enjoyed excellent water quality. *Id.* The clear blue waters attracted recreational boaters and anglers from the entire mid-north region and supported the vacation communities on the lake's east shore. *Id.*

A. The Decline in Water Quality of Lake Chesaplain

Beginning in the 1990s, Lake Chesaplain experienced various economic developmental pressures. *Id.* Over that decade, ten large-scale hog production facilities, considered concentrated animal feeding operations (CAFOs), were developed in the Union River watershed. A large-scale (greater than fifty million pounds per year) slaughterhouse was built in Chesaplain Mills to service the hog production facilities. *Id.* Around the same time, the recreational attraction of Lake Chesaplain led to a boom in second home construction on and near the eastern lakeshore. *Id.* Second home developments on the Lake Chesaplain shoreline are largely serviced by septic systems. *Id.* In addition, Chesaplain Mills has a publicly owned sewage treatment plant (STP) that discharges directly into Lake Chesaplain. *Id.* The hog CAFOs are regulated and subject to permits under a New Union Statute providing for New Union Agricultural Commission review and approval of site-specific nutrient management plans for applying liquid manure wastes to fields. *Id.*

Notwithstanding New Union's attempts at regulation, Lake Chesaplain's water quality visibly declined during the first decade of the twenty-first century. *Id.* Mats of algae formed

during the summer months, reducing the clarity of the water and promoting offensive odors. *Id.* Fish productivity declined. *Id.* The swimming beach at Chesaplain State Park became unsuitable for swimming, and property values for the vacation home communities fell. *Id.* Tourism revenue from fishing and boating trips plummeted. *Id.*

B. Development of The CWA Water Quality Provisions

The declining water quality of Lake Chesaplain led both EPA and State of New Union Department of Fisheries and Environmental Control (DOFEC) into a series of actions under the regulatory framework established by the Federal Water Pollution Control Act Amendments of 1972, now known as the CWA. *Id.* at 5. The CWA established a comprehensive system of permitting and regulation for point source discharges into the waters of the United States. *Id.* Point sources generally include pollution discharge pipes and specifically include Concentrated Animal Feeding Operations (CAFOs). *Id.* Numerical permit limits for individual point sources are established for specific water pollutants. *Id.* EPA sets these limits industry-by-industry based on technology-based standards as well as standards designed to achieve desired levels of water quality. *Id.*

States are expected to administer both the permitting aspects of the CWA and the water quality improvement aspects of the CWA. *See* CWA §§ 402(b), 208 (planning process for nonpoint sources), 303 (state establishment of water quality standards), 33 U.S.C. §§ 1342(b), 1288, 1313. Failure of a state to undertake permitting or certain aspects of the water quality program can result in EPA assuming administration of these programs. Order at 5.

The CWA's water quality based regulations form the basis of these suits. CWA § 303 directs states to adopt water quality standards (WQS) for waters within the state and regularly review and revise these standards. 33 U.S.C. § 1313. More specifically, a WQS consists of the

state-designated use for each body of water and the water quality criteria necessary to support that use. 33 U.S.C. § 1313(c)(2)(A).

Once a state has established WQS for its water bodies, it must assess the ability of each water body to meet the standards set following full implementation of the technology-based point source controls established by the CWA. *See* CWA § 303(d), 33 U.S.C. § 1313(d) (cross referencing technology-based controls of CWA § 301(b)(1), 33 U.S.C. § 1311(b)(1)). As the time for achievement of technology-based permit limits has long passed, this section practically requires states to identify those water bodies that presently do not meet WQS. Order at 6. EPA requires states to review and update their impaired waters list biennially. 40 C.F.R. § 130.7(d). Once a water is listed as impaired, CWA § 303(d) directs the state to develop and submit a TMDL for the offending pollutants “at a level necessary to implement the applicable water quality standards.” CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).

EPA has the authority to review and approve or reject each step of the water quality standards process. *See* 33 U.S.C. § 1313(c)(3), (d)(2). If the Administrator disapproves of the proposed WQS, list of impaired waters, or TMDLs, then EPA is directed to establish its own WQS, list, or TMDLs. *Id.*

By regulation, EPA defines a TMDL as “the sum of individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.” 40 C.F.R. § 130.2(i). Therefore, a state must submit to EPA a TMDL that establishes the total maximum level of pollutant loading for a water and instructs how that level of loading will be allocated among CWA-permitted point sources in the watershed, taking into account the non-permitted nonpoint sources and natural background sources. Order at 6. Alternatively, a state may take credit for nonpoint source pollution reductions:

If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations (LAs) practicable, then wasteload allocations (WLAs) can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs. 40 C.F.R. § 130.2(i).

The slaughterhouse has a CWA National Pollutant Discharge Elimination System (NPDES) permit issued by the State of New Union for a direct discharge into the Union River. Order at 7. Second home development septic systems are not subject to CWA permits. *Id.* The Chesaplain Mills STP has a CWA point source permit. *Id.* The hog CAFOs are not subject to NPDES permits because, although CAFOs are included in the definition of "point source," they are considered "non-discharging" CAFOs exempt from permitting requirements. *Id.*

C. Lake Chesaplain TMDL and Water Quality Standards Regulatory Actions

Pursuant to New Union WQS, Lake Chesaplain is designated as a Class AA water, which is the classification reserved for the state's highest quality waters (such as drinking water, primary contact recreation, fish propagation, and survival). *Id.* at 8. In response to the decline in water quality, the Lake Chesaplain Study Commission issued a report in August 2012 which included the following scientific conclusions. *Id.* First, Lake Chesaplain suffers from eutrophication, the ecological process by which a lake becomes less biologically productive due to excessive algae growth. *Id.* Besides being aesthetically displeasing, the algae growth is also responsible for objectionable odors, decreased water quality clarity, and decreased dissolved oxygen (DO) levels in the water column below the levels needed for a healthy fishery. *Id.* Summertime DO levels were found to be three milligrams per liter (mg/l), well below the five mg/l DO standard designated for Class AA waters. *Id.* The commission also determined that the maximum phosphorus levels consistent with a healthy lake ecosystem would be 0.014 mg/l

throughout the lake. *Id.* But measured phosphorus levels in the lake varied from 0.020 to 0.034 mg/l, well above the desired level. *Id.* In addition to the DO and phosphorus violations, the Chesaplain commission also identified violations of the state's water quality standards for odor and clarity. *Id.*

The next WQS review was conducted in 2014; DOFEC adopted a water quality criteria for Class AA waters of 0.014 mg/l. *Id.* As Lake Chesaplain violated the DO, odor, and clarity criteria, it was thus added to the impaired waters list and submitted to EPA. *Id.* DOFEC did not, however, submit a TMDL for Lake Chesaplain in its list of impaired waters. *Id.*

In 2015, Plaintiff Chesaplain Lake Watch served a notice letter to both New Union and EPA threatening to sue based on failure to establish a TMDL for Lake Chesaplain. *Id.* DOFEC then commenced a state rulemaking proceeding to establish a TMDL for Lake Chesaplain. *Id.* The Lake Chesaplain Commission issued a supplemental report in July 2016 calculating the maximum phosphorus loadings consistent with achieving the 0.014 mg/l phosphorus standard and identifying the existing sources of phosphorus inputs. *Id.* The maximum loading was

calculated at 120 metric tons (mt) annually. *Id.* Existing loadings as of 2015 were calculated as totaling 180 mt, 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
Total	180 mt

The report specifically determined that the hog CAFOs are a primary contributor to phosphorus loadings despite their “non-discharging” status. *Id.* A substantial portion of their manure spreading eventually reached Lake Chesaplain through groundwater flows and surface runoff, regardless of their compliance with state-mandated nutrient management plans and the CWA exemption for agricultural stormwater runoff. See 33 U.S.C. § 1362(14). Likewise, a substantial amount of phosphorus reached the lake from septic systems, even though sources are exempt from CWA permitting as dischargers to groundwater rather than surface water. *Id.* The supplemental report noted that neither of the point sources in the Chesaplain watershed had any permit limits for phosphorus, as no such limits are provided for in the relevant EPA technology-based effluent limitations guidelines. *Id.*

In October of 2017, DOFEC publicly announced a proposal to implement a TMDL through an equal phased reduction in phosphorus discharges by both point sources and nonpoint sources. *Id.* The reduction proposed a five-year phase in - that is, a 7% reduction from the 180 mt

baseline in year one, a 14% reduction from the baseline in year two, a 21% reduction in year three, a 28% reduction in year four, and a 35% reduction in year five. *Id.* Point source reductions would be incorporated through permit limits, while nonpoint source reductions were proposed to be achieved through a series of BMP programs designed to encourage the hog CAFOs and other agricultural sources. *Id.* Proposed BMPs for agricultural sources include modified feeds for animal production facilities that would reduce phosphorus in manure, physical and chemical treatment of manure streams, and restrictions on manure spreading when the soil is frozen or saturated. *Id.* Proposed BMPs for private septic systems consisted of increased septic tank inspection and pumping schedules. *Id.*

Although the scientific conclusions of the Chesaplain Commission were not substantively challenged, the proposed TMDL proved highly controversial. *Id.* Residential homeowners objected to the expensive septic tank maintenance and pumping required. *Id.* The slaughterhouse and Chesaplain Mills objected to the costly phosphorus treatment system needed to reduce discharges by 35%. *Id.* Chesaplain Lake Watch objected to taking credit for nonpoint source phosphorus reductions, arguing that the BMPs were insufficient to achieve a 35% reduction in nonpoint phosphorus inputs. *Id.* Instead, Chesaplain Lake Watch demanded that the sixty-three mt annual reduction be achieved by requiring zero phosphorus discharges from the identified point sources. *Id.* The hog CAFOs objected to the possible imposition of BMPs on their operations. *Id.* DOFEC adopted the Hog CAFOs' position and, in July 2018, adopted a TMDL that consisted solely of a 120 mt annual maximum—without any WLAs or LAs. *Id.*

EPA rejected the July 2018 TMDL pursuant to CWA § 303(d)(2) and adopted the original DOFEC TMDL proposal after notice and comment in May 2019, calling it the “Chesaplain Watershed Implementation Plan” (CWIP). *Id.* The CWIP did not specify whether or

how the proposed BMP measures would be enforced. *Id.* EPA incorporated the entire record of scientific reports and public comments before the DOFEC into its own record. *Id.*

D. Proceedings Below

New Union and CLW brought separate suits under APA § 702, 5 U.S.C. § 702, against EPA to challenge EPA's rejection of New Union's proposed TMDL and EPA's proposed TMDL. *Id.* at 10. Specifically, New Union brought No. 66-CV-2020 seeking a declaration that EPA's TMDL rejection, and the regulations governing TMDL submissions, are invalid. *Id.* CLW, in No. 73-CV-2020, sought declaration that the substantive provisions of EPA Lake Chesaplain phosphorus TMDL do not sufficiently protect Lake Chesaplain and should be vacated under the APA as contrary to law, arbitrary and capricious, and unsupported by the record. *Id.* The district court consolidated the suits. *Id.*

Chesaplain Lake Watch submitted affidavits with the following undisputed additional facts: The NPDES permit for the slaughterhouse expired in November 2018 and has not been reissued. *Id.* at 11. The NPDES permit for the Chesaplain Mills sewage treatment plant likewise expired in February 2019. *Id.* Both plants continue to operate under their expired permit as administratively extended based on their timely applications for permit renewal. *Id.* As such, neither plant is currently subject to any limit on phosphorus discharges. *Id.* DOFEC has proposed to modify each permit to reflect the 35% annual phosphorus loading reduction phased in over five years after permit issuance, but both facilities have sought administrative hearings on this proposed requirement based on the cost of compliance. *Id.* Since EPA adopted the Lake Chesaplain TMDL, New Union has taken no steps to require phosphorus reduction BMPs by nonpoint sources in the Lake Chesaplain watershed. *Id.* New Union has not modified the nutrient management permits for the hog CAFOs to incorporate any phosphorus reduction measures

contemplated by the CWIP. *Id.* Lake Chesaplain waters continue to violate water quality standards. *Id.*

Parties submitted and briefed cross-motions for summary judgment. With the parties' agreement, the district court decided the case based on the applicable law and the record before EPA. *Id.* at 5. The court (1) denied EPA's motion for summary judgment in part, (2) granted CLW's motion for summary judgment in part, and (3) granted New Union's motion for summary judgment vacating EPA's determination to reject New Union's proposed phosphorus TMDL for the Lake Chesaplain watershed and substitute its own TMDL. *Id.*

SUMMARY OF THE ARGUMENT

The district court was incorrect in holding that the issues raised are fit for adjudication—both in its order vacating EPA's rejection of New Union's TMDL and EPA's longstanding definition of TMDL and in its finding against the validity of EPA's phased Annual TMDL. The court was correct in finding that EPA's adoption of a credit for anticipated BMP pollution reductions was neither arbitrary and capricious nor an abuse of discretion.

This case is not ripe for judicial review as the TMDL promulgated does not constitute final agency action; without a further regulatory response, there is no definiteness of harm, and resolution would require reliance on hypothetical facts. Further, waiting for final agency action and development of facts would not cause the parties to face any undue hardship as this course of action is the quickest way to allow protection of Lake Chesaplain. Thus, the Court should decline to hear this case at this time and vacate the lower court's order.

EPA's decision to reject the New Union Chesaplain Watershed Phosphorus TMDL, for any reason, is clearly within the statutory authority granted to the agency by section 303(d)(2) of the CWA 33 U.S.C. § 1313(d)(2). This is visible in the lower court's need to rely on the use of an

“as applied” challenge to invalidate a definition adopted in 1985, finally allowing the court to reach EPA’s TMDL rejection. Order at 12.

Even so, EPA’s interpretation of TMDL to include WLAs and LAs is well within the bounds of the statutory language and therefore consistent with law. *Chevron* requires that the courts defer to the agency’s interpretation of an ambiguous statutory term. *See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Because the CWA does not explicitly define “total maximum daily load,” the term is open to interpretation by the agency. The agency has defined TMDL’s to include WLAs and LAs because evaluation of TMDL technical soundness and WQS achievability is impossible without WLA and LA component evaluation. 50 Fed. Reg. at 1775. The statute’s explicit direction that the EPA Administrator establish a TMDL “as he *determines necessary to implement* the water quality standards” illustrates that the agency interpretation is exactly what Congress intended. 33 U.S.C. § 1313(d)(2). The district court misapplied the *expressio unius* canon, erred in ignoring the statute’s clear direction, and failed to apply *Chevron’s* requirement of discretion properly.

EPA’s adopted “Chesaplain Watershed Implementation Plan” is valid, as TMDL expression in terms of an annual load and phased implementation of percentage reductions are consistent with the legal requirements of the CWA.

It is established that the term "total maximum daily load" is ambiguous, but there is a dispute as to whether "daily" is an explicit requirement of TMDL expression. Considering the statute's intent to protect water bodies in all circumstances and direction that the TMDL "be established at a level necessary to implement the applicable water quality standards," it is clear that "total maximum daily load" is susceptible to a broader range of meanings. 33 USC §1313(d)(1)(C). If TMDLs were limited to daily loads, certain chemicals that are not easily

tracked at the daily level, such as phosphorus, would not be attainable at the level "necessary" to meet the applicable water quality standards. For these reasons, the district court erred in its application of *Chevron*, as there is clear ambiguity, and the agency's interpretation deserves deference.

Similarly, nothing in the CWA precludes EPA from determining that phased implementation is appropriate. Therefore, *Chevron* step one is satisfied. The district court held otherwise by improperly construing the holding of *NRDC v. EPA*. *NRDC* is adequately distinguishable from the present case because EPA in *NRDC* approved a TMDL for a *minimum reduction*, while this case establishes a *maximum addition*. Additionally, the agency's interpretation aligns with the intent of the CWA as it allows for the pragmatic protection of the environment and employs well-measured public policy considerations to balance the economic well-being of those regulated by the TMDL. As such, the agency's actions are accorded *Chevron* deference and should be upheld.

Lastly, CLW argues that EPA has abused its discretion by allowing for credit of phosphorus LA reductions anticipated from implementing BMP's for nonpoint sources. The basis of this argument is that EPA has no authority to require implementation of BMPs, and to properly implement the TMDL would require a "reasonable assurance" that the reductions will be achieved. Aside from the fact that this argument explicitly illustrates why this case is not yet ripe for review (the need for hypothetical facts to prove a point), it also fails on the merits. EPA did not abuse its discretion when promulgating the TMDL. CLW cites EPA guidelines for the standard of "reasonable assurance," but that guideline has not undergone notice and comment rulemaking and therefore receives no deference. Instead, EPA's actions may only be set aside if determined to be "arbitrary and capricious" or an abuse of discretion.

The Administrative Procedure Act requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions that are found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). To make this finding, the Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The TMDL promulgated includes BMPs that target the phosphorus released by some of Lake Chesaplain's most prolific polluters and, therefore, can be reasonably expected to yield significant reductions. EPA's reasoning easily passes the arbitrary and capricious standard and was not an abuse of discretion.

STANDARD OF REVIEW

A district court's grant or denial of a motion for summary judgment is reviewed *de novo*. See, e.g., *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 511 (3rd Cir. 1994); *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). Under Rule 56(c), summary judgment is appropriate if the record shows no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). Inferences should be drawn in the light most favorable to the nonmoving party. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1360 (3d Cir. 1992).

ARGUMENT

I. This Case is not Ripe for Judicial Review.

This case is not ripe for judicial review. The promulgated TMDL alone has no impact on the parties, and only once New Union issues regulations will the case be ripe for judicial review. Until that time, EPA should be free to continue its decision-making process without the undue burden of litigating inchoate facts.

The doctrine of ripeness prevents courts from interceding in abstract disagreements. *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). In *Abbott Labs*, the Supreme Court fashioned a two-factor test for pre-enforcement challenges regarding the issue of ripeness. *Id.* at 149. The first factor is the suitability or fitness of the case for immediate judicial resolution. *Id.* The second is hardship to the plaintiff from delay in judicial review. *Id.*

A. The Case is not Suitable for Immediate Judicial Resolution Because There has not been Finality in the Water Quality Standards Program.

The fitness factor addresses whether courts can resolve such a question in the first place. *See Texas v. United States*, 523 U.S. 296, 300 (1998). Further, a claim is not ripe for adjudication if it rests upon contingent future events that may or may not occur as anticipated. *Id.* The fitness factor can be broken down into three subfactors: (1) finality of the issue presented for review by the court; (2) definiteness of the threat of harm; and (3) the extent to which resolution relies on facts not yet developed. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998). The Supreme Court clarified the definition of final agency action using a two-part test: (1) the action must be the last step in the agency's decision-making process—not an interlocutory step; and (2)

the action must determine rights or obligations or create inevitable legal consequences. *U.S. Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807, 1817 (2016).

The issue raised before the Court centers on the CWIP's TMDL, which is not a final action. An entire network of interconnected regulations is yet to be produced. Without New Union's regulatory response to the TMDL, this Court is forced to focus on an intermediate procedure, grounded in untested theories and hypothetical harms. Even if promulgating the TMDL were the last step in EPA's decision-making process, it is still not final action because it neither determines rights or obligations nor creates inevitable legal consequences. *Hawkes*, 136 S. Ct. at 1817 (citing *Bennet v. Spear*, 520 U.S. 154, 178 (1997)) (Kagan, J., concurring). The CWA requires the state to produce NPDES based on an approved TMDL, no matter who produced the TMDL. 33 U.S.C. § 1342(b). Additionally, there is no definiteness of harm. Although the TMDL contemplates specific NPDES permit limits, it does not impose them; that is New Union's role. 33 U.S.C. § 1342(b). While the NPDES that New Union adopts may injure the parties, there is no definite indication that it will.

In *Arcadia* and *Bravos* the states submitted their TMDLs to EPA, and EPA approved them, but neither case was ripe for review. *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003); *Bravos v. Green*, 306 F. Supp. 2d 48 (D.D.C. 2004). In today's case, EPA produced a new satisfactory TMDL instead of rubber-stamping a poorly-devised one. This case rests at the same step in the resolution process as *Arcadia* and *Bravos*—awaiting state-produced NPDES.

The district court cited *Am. Farm Bureau* as contrary precedent. *Am. Farm Bureau* is distinguishable from the instant case because the plaintiff in that case clearly defined its harm—the cost of complying with the TMDL. *American Farm Bureau Federation v. U.S. EPA*, 792

F.3d 281, 293–94 (3d Cir. 2015). Here, CLW claims they will be harmed if New Union chooses not to implement BMPs for only point sources. New Union claims that it will be harmed if required to produce NPDES that are contrary to law. Neither of these prospective harms meet the level of definition in *Am. Farm Bureau*. Judicial review on this undeveloped record would have little recourse but to stray into the realm of an advisory opinion.

Under APA § 704, this action should not move forward. 5 U.S.C. § 704. EPA should not be dragged into court at each step in the regulatory process. *See Texas*, 523 U.S. at 300. Congress laid out clear statutory language to that effect: “[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the *final agency action*.” 5 U.S.C. § 704 (emphasis added). Without New Union’s regulatory response to the TMDL, this Court is forced to focus on an intermediate procedure, grounded in untested theories and hypothetical harms. Any supposed harm is speculative at best—and insincere at worst. Only after the NPDES are promulgated can a claim that an imminent injury be offered without engaging in unconstrained speculation. Further factual development would significantly improve the Court’s ability to deal with any legal issues presented. *Nat’l Park Hosp. Ass’n v. Dept. of Interior*, 583 U.S. 803, 812 (2003).

B. The Parties do not Face Undue Hardship by Waiting for a Final Agency Action.

The second prong under *Abbott Labs* is hardship to the parties. *Abbott Labs*, 387 U.S. at 148. It is hard to determine what hardship the Plaintiffs face by waiting for final agency action and further factual development. The NPDES permits have not been modified, and BMP requirements have not been implemented. Any claim of harm to Lake Chesaplain by delay rings hollow since requiring litigation and repetitive agency actions—to include re-writing the

TMDL—would cause more short-term harm than simply allowing the regulation to take effect before bringing judicial action.

New Union does not claim hardship aside from believing they should not be required to produce NPDES or implement BMPs. "[M]ere uncertainty as to the validity of a legal rule" is not a hardship for purposes of ripeness analysis. *Nat'l Park Hosp. Ass'n v. Dept. of Interior*, 583 U.S. 803, 811 (2003). The parties here have only claims of uncertainty to rely upon.

This claim is not yet fit for judicial review. While the parties are undoubtedly committed to clean water, without further development, litigation only hinders the Administrator from the ability to do his job. Here, there is no legitimate claim that waiting for ripeness would lead to significant hardship. The Court should decline to hear this case.

II. EPA had the Authority to Reject and Replace New Union's TMDL.

EPA's decision to reject the New Union Chesaplain Watershed Phosphorus TMDL, for any reason, is clearly within the statutory authority granted to the agency by section 303(d)(2) of the CWA. 33 U.S.C. § 1313(d)(2). In *Mead*, the court explained that agency interpretations are entitled to deference if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Further, Congress did not speak to the precise question at issue, so this Court should defer to EPA's reasonable interpretation of the CWA. The proper framework for determining deference, in this case, is the familiar Chevron test. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

A. EPA is Entitled to *Chevron* Deference Because Congress did not Unambiguously Speak to TMDL Inclusion of Wasteload and Load Allocations.

The first step in a *Chevron* analysis is asking whether Congress has directly spoken to the precise question at issue. *Id.* The court can look at legislative history, the plain meaning of the statute, canons of interpretation, or some combination of all three. When a court determines that Congress has not spoken directly to the issue at hand, the court may then move to the second step. That is what should happen here.

The statutory language at issue is found in section 303(d)(1)(C) of the CWA:

“Each State shall establish for the waters identified . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations.”

33 U.S.C. § 1313(d)(1)(C).

The CWA then continues in section 303(d)(2):

“Each State shall submit to the Administrator . . . , for his approval the waters identified and the loads established The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. . . . If the Administrator disapproves such identification and load, he shall . . . identify such waters in such State and *establish such loads* for such waters *as he determines necessary* to implement the water quality standards applicable to such waters”

33 U.S.C. § 1313(d)(2) (emphasis added).

Chevron step one requires the court to determine “whether the statute unambiguously forbids the Agency's interpretation.” *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). The CWA does not explicitly define “total maximum daily load.” Further, the sections above grant EPA power to approve or deny a TMDL, *as the Administrator determines necessary*, and establish a TMDL when a state either fails to establish or proposes an insufficient TMDL. Based on the

plain meaning of the statutory language, EPA has clear authority. This is apparent in the lower court's need to rely on an "as applied" challenge to invalidate a definition adopted in 1985, finally allowing the court to reach EPA's TMDL rejection. Resolution of *Chevron* Step One Analysis should stop here because, although there is ambiguity in the term Total Maximum Daily Load, the CWA unambiguously grants EPA authority to make this interpretation.

Even so, New Union and the district court disagree. The basis of their argument is that EPA does not have authority to issue a TMDL that includes WLAs and LAs because the word "total" should be read in a limited fashion. In essence, the argument interprets a TMDL to be nothing more than the very start of a planning process. Under this approach, EPA would promulgate TMDLs as a singular number. That interpretation reads an incredible limitation into the statute, unnecessarily lengthens the process, and contradicts this section's goal. Considering the complexity and importance of developing timely plans to protect water quality and EPA's expertise in the matter, it is unlikely Congress meant to limit the agency in this way. Especially using language that has been interpreted to the contrary for roughly 40 years. Therefore, TMDL should be read as an ambiguous whole, not broken into fragments and subjected to pedantic vivisection.

Additionally, the lower court misapplied the *expressio unius* canon because the CAA and the CWA are not *in pari materia*. The *expressio unius* canon, also known as the negative implication canon, means that if one thing is expressed in a statute, the alternative is excluded. *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017). The *in pari materia* canon is used when two statutes cover the same subject matter and therefore should be interpreted together. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). The use of *expressio unius* here is inappropriate as the statutes cover different subject areas. *See, e.g., SW General*, 137 S. Ct. at

940 (“The *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.”) (internal quotations omitted); *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (declaring *in pari materia* inappropriate for the two different concepts of subject matter jurisdiction and venue); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003) (*expressio unius* “only has force when the items expressed are members of an associate group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence”) (internal quotations omitted). Water pollution and air pollution follow fundamentally different principles, so Congress wrote two fundamentally different statutes, and *Expressio unius* cannot properly apply between them.

The text of the statute does not forbid EPA from interpreting TMDLs to include WLAs and LAs. Congress’s chosen language grants EPA authority on the issue and far from precludes this interpretation. The last question under *chevron* is whether the agency’s interpretation was reasonable.

B. EPA is Entitled to *Chevron* Deference Because the Agency’s Interpretation of the CWA is Reasonable.

Once the court has determined that the statute is ambiguous, the court must defer to the agency so long as its interpretation is reasonable. *Chevron*, 467 U.S. at 844. EPA's interpretation of the statute should stand because the agency's interpretation was proper.

In EPA's rulemaking concerning the CWA, the agency found the following:

“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.”

50 Fed. Reg. at 1775.

Section 303(d)(2) is explicit in its order to the Administrator to establish a TMDL “as he *determines necessary to implement* the water quality standards applicable to such waters.” 33 U.S.C. § 1313(d)(2) (emphasis added). Considering that the CWA states that the TMDL must be one necessary for implementation and that EPA has established that a TMDL without WLAs and LAs is not “technically sound,” this determination is entitled to deference under even the most stringent interpretation of *Chevron* step two. *Cf. Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (requiring agencies to provide adequate and reasoned explanations for policy changes). The statute’s explicit direction is illustrative that the agency interpretation is exactly what Congress intended.

The district court misapplied the *expressio unius* canon, erred in ignoring the statute's clear direction, and failed to apply *Chevron*'s requirement of discretion properly. EPA's adopted “Chesaplain Watershed Implementation Plan” is valid, as TMDL expression in terms of an annual load and phased implementation of percentage reductions are consistent with the legal requirements of the Clean Water Act.

III. The Phased Annual TMDL Adopted by EPA is Valid.

Both disputed aspects of the TMDL are valid. Expression of the TMDL as an annual load is valid because it is supported by the text and intent of the CWA. Even if the Court finds EPA's reasoning unpersuasive, the text of the CWA is ambiguous, so the Court should defer to the agency's reasonable interpretation of the statute. The district court erred in ending the inquiry at *Chevron* step one because the text is ambiguous. EPA’s interpretation of the statute is reasonable and entitled to deference under *Chevron* step two. Second, the TMDL’s implementation of

reductions as a percentage of a prior baseline phased in over five years, is textually valid and serves the purpose of the CWA.

A. A TMDL May be Expressed as an Annual Load.

According to EPA regulation, TMDLs “can be expressed in terms of either mass per time, toxicity, or other appropriate measures.” 40 CFR § 130.2(i). The proposed New Union TMDL and the EPA TMDL expressed the amount of pollutants that could be discharged in terms of an annual load (*i.e.*, “mass per time”). CLW argues that such an expression contradicts the text of the CWA, which requires a “total maximum *daily* load.” They also argue that an annual load cannot capture seasonal variations, as required by the CWA, and is contrary to the text for that reason as well. The district court agreed.

There is a circuit split over the interpretation of “total maximum *daily* load.” *See Am. Farm Bureau v. EPA*, 792 F.3d 281, 297 (3d Cir. 2015). In *Muszynski*, the Second Circuit held that “the CWA does not require that all TMDLs be expressed strictly in terms of daily loads.” *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 103 (2d Cir. 2001). The court reasoned that the intent of the CWA would not be accomplished by formalistically utilizing daily loads in every circumstance. *Id.* at 98–99. The Second Circuit’s rationale avoided an absurd result by interpreting ‘TMDL’ to include annual loads. This allowed for the statute’s purpose to be accomplished without doing violence to the text. This aligns with the Supreme Court holding; any “absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.” *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) (“A statute should be interpreted in a way that avoids absurd results.”). However, the D.C. Circuit has held in *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.* that EPA must express all TMDLs in terms of daily loading. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006).

The district court's *Chevron* analysis was misguided. The first step in a *Chevron* analysis asks whether Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842-843. The relevant text of the CWA does not directly speak to whether a TMDL may be expressed as an annual load. The rationale from *Muszynski* applies here. The Second Circuit reasoned that there is ambiguity in the phrase "total maximum daily load." This comes from the apparent command for loads to be expressed in daily terms, balanced against the statute's intent to protect water bodies in every possible circumstance.

The text of the CWA explicitly states that each TMDL "shall be established at a level necessary to implement the applicable water quality standards." 33 USC §1313(d)(1)(C). If EPA were limited to only daily loads, certain chemicals, such as phosphorus that are not easily tracked at the daily level, could not be established at the level necessary to meet the applicable water quality standards. The Second Circuit noted "Congress . . . directs the EPA to approve TMDLs for hundreds of different pollutants in thousands of different water bodies, and it is excessively formalistic to suggest that EPA may not express these standards in different ways, as appropriate to each unique circumstance." *Muszynski*, 268 F.3d at 97 (citing *Nat. Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531 (S.D.N.Y. 2000)).

In *Friends of Earth, Inc. v. EPA*, the D.C. Circuit held that the statute's text was clear that a TMDL had to be expressed in terms of a daily load. The court pointed out that Congress chose the word 'daily' as the relevant period of pollutant loading. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). The court also noted that an annual load could not capture the seasonal variations that the statute requires EPA to consider. *Id.* The error in this reasoning is that the text is considered in a vacuum. Such a narrow interpretation of the CWA defeats the express purpose

of the statute—“to implement the applicable water quality standards.” 33 USC §1313(d)(1)(C). Accordingly, the Second Circuit’s interpretation is more convincing.

Upon determination that the statute is ambiguous, the court must proceed to *Chevron* step two. Under *Chevron* step two, the court must defer to the agency so long as its interpretation is reasonable. *Chevron*, 467 U.S. at 844. The agency meets this threshold. As the Second Circuit notes in *Muszynski*, “[i]n the case of other pollutants, like phosphorus . . . [the] harmful consequences of excessive amounts may not occur immediately.” *Muszynski*, 268 F.3d at 98. This suggests that a daily load amount may not be prudent to accomplish the goal of protecting water quality for phosphorus. The purpose of the CWA could not be adequately met if the CWA formalistically required that each TMDL operate on daily terms. Therefore, the agency’s interpretation is correct because it is the only interpretation that does not create a conflict between the text of the TMDL provision and the purpose of the CWA.

Accordingly, EPA’s interpretation of the CWA is entitled to deference, and an annual load is an acceptable method of distributing pollutant loads. The district court’s interpretation of the statute is overly formalistic and fails to consider context. While EPA does not doubt CLW’s commitment to clean water, this approach is short-sighted. Holding that TMDLs can only be expressed in terms of a daily load might protect some bodies of water but would harm EPA’s efforts to protect bodies of water plagued by covert pollutants like Lake Chesaplain.

B. A TMDL May Use a Phased Percentage Reduction in Pollutant Loadings.

In *American Farm Bureau Federation v. EPA*, the Third Circuit held that the “amount of acceptable pollution in a body of water is necessarily tied to the date at which the EPA and the states believe the water should meet its quality standard.” *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 300 (3d Cir. 2015). The Third Circuit goes on to note that the CWA is silent on “whether

the EPA in calculating a TMDL may consider and express the time frames within which it and the states will strive to achieve water quality standards.” *Id.* at 306. Notwithstanding this silence, the CWA directs the creation of a TMDL that regulates the load “at a level necessary to implement the applicable water quality standards.” 33 U.S.C. §1313(d)(1)(C).

The CWIP is expressed as a percentage reduction from the original 180 mt baseline, with the ultimate result of achieving the 120 mt maximum load in 5 years. Order at 9. This is accomplished by each individual polluter progressing towards a 35% reduction by the fifth year. The polluters were asked to assess their baselines under the current 180 mt annual regime, and then to make a 7% reduction from the baseline in the first year, a 14% reduction in the second year, a 21% reduction in the third year, a 28% reduction in the fourth year, and a 35% reduction in the fifth year. *Id.*

The district court misapplied the holding of *NRDC v. EPA*. While it is true that the TMDL adopted by the State of Maryland and the District of Columbia in *NRDC* required polluters to take a percentage of their baseline, that is where the similarity ends. The TMDL in *NRDC* limited the amount of trash that goes into the river. “Instead of setting the *maximum* amount that can *enter* the river before it failed to meet its water quality standards, the two jurisdictions set a *minimum* amount of trash that would have to be *removed* from the river.” *Nat. Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 136 (D.D.C. 2018).

In the present case, the polluters were asked to assess their baselines and reduce them by a set percentage each year. This has nothing to do with a minimum amount to be removed. The TMDL instead sets a maximum amount that can enter the river. The only thing that makes this TMDL unusual is that it utilizes a phased percentage reduction format. Nothing in the case law,

CWA, or EPA's regulations precludes the EPA from determining that this was appropriate. *Chevron* step one is therefore satisfied.

The district court emphasized that the “[CWA’s] direction to calculate a total maximum daily load . . . at a level necessary to implement the applicable water quality standards . . . does not admit of a loading standard that will not achieve water quality standards until five years hence.” Order at 15 (internal quotations omitted). This view does not align with reality. While the case law on the topic of delaying implementation of TMDLs is limited, there is ample case law concerning delays to the development of TMDLs. The District Court for the District of Columbia in *Anacostia Riverkeeper, Inc. v. Jackson* determined that the development of a new TMDL takes on average four years. *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 55 (D.D.C. 2010). It later extended that deadline to eleven years. *Anacostia Riverkeeper, Inc. v. Pruitt*, No. 09-0098 (JDB), 2017 WL 6209176 at *2 (D.D.C. Sep. 15, 2017). If the TMDL development process can be given eleven years, there is no reason to believe that implementation must be immediate.

Additionally, there are practical reasons for requiring a phased approach to implementation. This approach allows for point sources and nonpoint sources to ease into their reductions. A balanced approach will benefit the environment in the long run without causing severe economic distress to emitters that would otherwise have to make a thirty-five percent reduction in emissions immediately. This method is not anomalous. It serves the purpose of the CWA and is the better option from a public policy perspective. The regulation is a reasonable interpretation of the text and should be accorded due deference. *Chevron* step two is therefore satisfied.

EPA’s interpretation of the phased approach to implementing the TMDL is valid. EPA’s interpretation is entitled to *Chevron* deference because Congress has not spoken on the issue of

the phased implementation of TMDL standards. The district court misapplied *NRDC v. EPA* to the current TMDL. *NRDC* is adequately distinguishable from this case because there EPA approved a TMDL for a *minimum reduction*, while this case establishes a *maximum addition*. The agency's interpretation is reasonable because it aligns with the CWA's intent and is a well-measured public policy decision. The agency's actions warrant *Chevron* deference and should be upheld.

IV. EPA May Apply Wasteload Allocation Credits Based on Assumed Pollutant Reductions from Nonpoint Source BMPs.

40 C.F.R. § 130.2 states, "if [BMPs] or other nonpoint source pollution controls make more stringent [LAs] practicable, then [WLAs] can be made less stringent." Thus, the regulation provides a process by which a credit can be taken from LAs to make WLAs less stringent. In *American Farm Bureau v. EPA*, the *Third Circuit* noted that "the [CWA] assigns the primary responsibility for regulating point sources to EPA and nonpoint sources to the states." *Am. Farm Bureau*, 792 F.3d at 299. The *Third Circuit* also noted that the CWA is silent on "the extent to which EPA may consider and express whether a state will meet the goals it sets (the 'reasonable assurance' requirement)." *Id.* at 306.

When EPA applies its regulatory standards to the record before the agency, the court applies the highly deferential "arbitrary and capricious" standard of review. The APA requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions that are found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). To make this finding, the court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The Supreme Court has noted the "court is not empowered to substitute its judgment for that of the agency." *Id.*

In *Overton Park*, the agency's action was deemed arbitrary and capricious because it did not give any reason for why it chose the action. *Id.* at 420.

The Chesaplain Supplemental Report determined that the current discharges into Lake Chesaplain amount to 180 mt per year. The amount that the lake can absorb without being impaired is only 120 mt per year. The current breakdown of contributions is 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

Total 180 mt

Given that manure spreading is considered to be a "non-discharging" CAFO, exempt from permitting requirements, and the biggest phosphorus polluter is the CAFO manure spreading operation, EPA sought to establish a credit for anticipated pollution reductions from nonpoint sources to reduce the stringency of WLAs from point sources, who make up a smaller share of the pollution. CLW contends that the credit imposed by EPA was arbitrary and capricious or an abuse of discretion because there is no 'reasonable assurance' that the BMPs will reduce nonpoint source pollution. CLW urges that EPA instead impose the duty of making pollutant reductions solely on the point sources, even though the largest single emitter of phosphorus is not a point source.

As Judge Remus correctly noted, reasonable assurance is not required to implement BMPs as a part of a TMDL. CLW's position cites EPA guidance, but such guidance is not entitled to any

deference. *See United States v. Mead Corp.*, 533 U.S. 218, 254 (2001) (Scalia, J., dissenting) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000)) (“Interpretations such as those in opinion letter-like interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference.”). In fact, EPA considered codifying the guidance into a regulation, but withdrew the revision before it was implemented. *See* 65 FR 43586-01, *see also* 68 FR 13608-01. This is instead a case of EPA applying its regulatory standards, not a final action. Accordingly, EPA's actions can only be put aside if they are deemed "arbitrary and capricious" or an abuse of discretion.

EPA did not act arbitrarily and capriciously, nor did it abuse its discretion when reinstating the original TMDL. The original TMDL devised by New Union included BMPs aimed at encouraging private enterprises to reduce their phosphorus contributions to Lake Chesaplain. The BMPs included modified feeds for animal production facilities that would reduce the amount of phosphorus in the animal's manure, physical and chemical treatment of manure streams, and restrictions on manure spreading when the soil is frozen or saturated. Proposed BMPs for private septic tanks consisted of increased septic tank inspection and pumping schedules. Considering that the largest emitter of phosphorus is the CAFO manure spreading operations, these BMPs are expected to yield significant reductions in phosphorus.

CLW mentions that it has already been two years since the TMDL implementation and that this indicates that the reasonable assurance standard is not met. As stated, CLW ignores that the agency's "reasonable assurance" standard did not undergo notice and comment, and therefore is not final agency action. Reasonable assurance is not the proper standard. Additionally, CLW's suggested allocation of responsibility not only allows the biggest emitter to take no responsibility for its pollution but would be contrary to the text, structure, and spirit of the CWA.

The CWA states "[e]ach State shall identify those waters within its boundaries for which effluent limitations [imposed on point sources] . . . are not stringent enough to implement water quality standards," and "[e]ach State shall establish for the waters identified . . . the total maximum daily load, for those pollutants which the Administrator identifies." 33 U.S.C. § 1313(d)(1)(A–C). This means that to establish a TMDL, effluent limitations must have already failed to meet water quality standards. A TMDL that utilizes only effluent limitations on point sources in a water body with primarily nonpoint source pollution would be ineffective. Furthermore, using only point source reductions would violate the spirit of the CWA. "The CWA regulatory program is based on . . . 'cooperative federalism.'" Order at 5. If EPA were to make a TMDL that only accounts for point sources—which can be entirely co-opted by the federal government—without allowing the state an option to regulate nonpoint sources, this cooperative federalism framework would be undone. Instead, in the spirit of cooperative federalism, EPA creates a TMDL that accounts for point sources and allows state regulation of nonpoint sources.

Thus, EPA's actions were neither arbitrary and capricious nor an abuse of discretion. The standard of review accorded to EPA when it applies its regulatory standards is highly deferential. *Overton Park*, 401 U.S. at 416. While EPA guidance may require 'reasonable assurances' of reductions, the guidance receives no deference because it has not undergone notice and comment rulemaking. Even if the Court found that 'reasonable assurances' need to be made, this is not detrimental to EPA's case because there is evidence that the BMPs will be effective. Lastly, holding for CLW would result in allocations for phosphorus pollution coming entirely from the point sources, violating the text and spirit of the CWA. Accordingly, EPA's regulatory design applying a credit from load reductions achieved through BMPs to reduce the burden on the smaller point source polluters should stand.

CONCLUSION

Upon the foregoing, Appellant EPA respectfully requests this Court vacate the district court's order for lack of ripeness. Alternatively, EPA respectfully requests this Court affirm the district court's partial denial of summary judgment for CLW and reverse the district court's partial grant of summary judgment for CLW and grant of summary judgment for New Union.