

DOWN BY THE CHESAPEAKE BAY: COOPERATIVE FEDERALISM, JUDICIAL INTERVENTION, AND THE BOUNDARY BETWEEN STATE LAND USE AND FEDERAL ENVIRONMENTAL LAW

Synopsis: In 2010, the Environmental Protection Agency (EPA) published a rule dictating the “total maximum daily load” (TMDL) of pollution that could be released into the Chesapeake Bay in compliance with the Clean Water Act (CWA).¹ Trade associations and members that would be affected by the TMDL’s implementation (collectively Farm Bureau) sued the EPA and alleged it exceeded the scope of its authority to regulate because the TMDL went beyond an allowable quantity of pollutants.² The Farm Bureau supported its argument through its version of federalism “under which the canons of statutory construction require a court to disfavor any legal interpretation that would push water quality law into the realm of land use regulation.”³ The Third Circuit accepted “the general principle that an ambiguous statute should not be construed to change the balance of federal and state authority over land use.”⁴ By partly accepting the Farm Bureau’s asserted canon of construction, the court encouraged “the constitutionalization of the boundary between state land use and federal environmental law.”⁵ Further constitutionalization of the boundary between state land use and federal environmental law would create judicially-enforced arbitrary lines that inhibit collaboration in the cooperative federalism framework and encourage states to exercise their own independent regulations.⁶

I.	Background	254
	A. Legislation, State Rights, and Cooperative Federalism	254
	B. Sections 303 & 303(d) of the CWA & TMDLS	255
	1. History	255
	2. Total Maximum “Daily” Loads	257
	3. Case Study: Lake Champlain TMDL Failures	258
	4. Accountability Framework – The Chesapeake Bay TMDLs Difference	258
II.	Analysis	259

1. Am. Farm Bureau Fed’n v. EPA, 792 F.3d 281, 287 (3rd Cir. 2015).
 2. Am. Farm. Bureau Fed’n v. EPA, 984 F. Supp. 2d 289, 294 (M.D. Pa. 2013).
 3. Dave Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, LAW PROFESSOR BLOGS NETWORK (July 7, 2015), http://lawprofessors.typepad.com/environmental_law/2015/07/two-interesting-things-about-the-chesapeake-bay-tmdl-decision.html.
 4. OWEN, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.
 5. OWEN, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.
 6. See generally *id.*; Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ELR 10426 (2014); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999).

A.	Procedural History	260
B.	The Third Circuit's Analysis.....	260
1.	Chevron Doctrine	260
2.	Plain Language and Purpose of the TMDL.....	262
3.	Avoidance Canon: Federalism	262
C.	Chevron Doctrine Analysis Conclusions	263
D.	Future Impacts of the Avoidance Canon.....	264
1.	Sixty Years of Precedent	264
2.	Inhibits Collaboration.....	265
3.	Encourages State Supremacy	266
4.	Supreme Court Denied Writ of Certiorari.....	266
III.	Conclusion	266

I. BACKGROUND

A. *Legislation, State Rights, and Cooperative Federalism*

The Federal Water Pollution Control Act (FWPCA) of 1948 was the first major federal law in the United States to address water pollution.⁷ No federal agency, however, had oversight authority and the FWPCA morphed into a moral encouragement rather than a mandate.⁸ In 1972, spurred by public outrage at unchecked pollution dumping in waterways, Congress radically amended the FWPCA with the goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹ Consequently, Congress created what is now known as the CWA.¹⁰

Today, the CWA is still the primary federal law governing water pollution, and the waters of the United States are notably cleaner.¹¹ The CWA encourages new innovative technology to meet water quality goals.¹² The CWA’s success is driven primarily by state-made water quality standards, which are further supplemented by federal measures.¹³

Before the CWA, state and local governments organized water pollution control.¹⁴ Few states had even set water quality standards by 1972.¹⁵ As a result, industrial wastewater was generally left untreated, fisheries vanished, and sewage

7. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Summary of the Clean Water Act, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Apr. 7, 2017).

8. Gregory L. Poe, *The Evolution of Federal Water Pollution Control Policies*, No. 186310, EB SERIES, CORNELL UNIVERSITY, DEPARTMENT OF APPLIED ECONOMICS AND MANAGEMENT (Feb. 1995) http://publications.dyson.cornell.edu/outreach/extensionpdf/1995/Cornell_AEM_eb9506.pdf.

9. *Id.*; PBS SCIENCE, *A Brief History of the Clean Water Act*, <http://www.pbs.org/now/science/clean-water.html> (last visited Apr. 7, 2017); 33 U.S.C. 1251 (2011).

10. 33 U.S.C. § 1251 (2011).

11. *Id.*; Shana Campbell Jones, *Making Regional and Local TMDL's Work: The Chesapeake Bay TMDL and Lessons from the Lynnhaven River*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 277, 277-78 (2014).

12. Brooke Smith, et. al, *Water Quality Trading: Setting the Record Straight*, 31 NAT. RES. & ENV'T 53 (2017).

13. *Id.*

14. *Id.*

15. Houck, *Cooperative Federalism*, *supra* note 6, at 10426.

discharges grew at startling rates.¹⁶ Without federal assistance, state run pollution control programs failed.¹⁷

The CWA's success is due the federal government's intervention into the traditionally state and local government domain.¹⁸ The CWA works under a cooperative federalism framework where federal, state, and local governments divide the task of cleaning the nation's waters.¹⁹ Under this framework, the EPA is responsible for establishing national environmental standards that states then qualify to administer and enforce.²⁰ To mitigate water pollution, the CWA delegates certain responsibilities to the EPA and other responsibilities to the states.²¹ Practically, the federal government cannot implement federal standards without the resources, expertise, information, and political support of state and local officials.²² Nothing in the CWA prohibits states from exceeding the federal requirements.²³

Yet, the federal-state partnership under cooperative federalism is not equal.²⁴ The EPA supervises, checks, and supersedes state authority to implement the CWA.²⁵ The EPA's standards bind a state unless it develops a persuasive reason not to follow the rule.²⁶ There is always a presumption in the federal government's favor.²⁷ The Supreme Court found the cooperative federalism framework constitutional because it offers states a choice of either regulating activity according to federal standards or having state law pre-empted by federal regulation.²⁸

B. Sections 303 & 303(d) of the CWA & TMDLS

1. History

Section 303 governs the CWA's requirements that each state must identify and rank waters within its boundaries where technology-based controls

16. Campbell Jones, *Making Regional and Local TMDL's Work*, *supra* note 11, at 277-78.

17. Houck, *Cooperative Federalism*, *supra* note 6, at 10429 (stating that "[m]any states were reluctant to set water quality standards.).

18. Eric M. Larsson & Jill M. Marks, *Construction and Application of Clean Water Act's Total Maximum Daily Loads (TMDLs) Requirement for Waters Failing to Achieve Water Quality Standards Under 33 U.S.C.A. §1313(d)*, 53 A.L.R. FED.2d 1 (2011) [hereinafter LARSSON & MARKS, *Construction and Application of CWA's TMDL*].

19. *Am. Farm Bureau Fed'n*, 792 F.3d at 288.

20. Robert V. Percival, Symposium, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995).

21. Katie M. Sweeney & Sherri A. Armstrong, *Cooperative Federalism in Environmental Law: A Growing Role for Industry*, A.B.A. SEC. ENV'T ENERGY RESOURCES at 1, 2 (2013) [hereinafter SWEENEY & ARMSTRONG, *Cooperative Federalism in Environmental Law*].

22. Percival, *Symposium*, *supra* note 20, at 1174-75.

23. Houck, *Cooperative Federalism*, *supra* note 6, at 10440.

24. *Id.* at 10429.

25. *Id.*

26. *Id.* at 10428.

27. *Id.*

28. Houck, *Cooperative Federalism*, *supra* note 6, at 10428; *New York v. United States*, 505 U.S. 144 (1992).

are inadequate to attain quality water standards.²⁹ This step allows the administrator of the EPA to review and amend the standard, if needed.³⁰ The section 303(d) amendments guides states in how to reach the standards set forth by the EPA.³¹ The first step in this process is to understand that the CWA states that water pollution originates from either point sources or non-point sources.³² For point sources, Congress developed a National Pollution Discharge Elimination System (NPDES) that issues permits for discharges of pollutants.³³ Each point source must have a NPDES permit to discharge pollutants.³⁴ When state waters remain heavily polluted under the NPDES permit system, states must identify the waters as “water quality limited segments” (WQLS) under the CWA.³⁵ A state then ranks its polluted WQLS according to the “total maximum daily load” of pollutants.³⁶ The section 303(d) requires states to:

[E]stablish . . . the total maximum daily load[] for those 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.³⁷

A TMDL encompasses the sum of the “individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background for particular pollutants.”³⁸ TMDL represent the maximum discharge quantity of a pollutant from both point sources and nonpoint sources.³⁹ Often called a comprehensive “pollution diet,” a TMDL has rigorous accountability measures.⁴⁰ States must submit the TMDLs to the EPA for those pollutants not brought to an acceptable level by point source controls.⁴¹ The EPA then issues permits to meet pollution limitations.⁴²

29. LARSSON & MARKS, *Construction and Application of CWA's TMDL*, *supra* note 18.

30. *Id.*

31. *Id.*

32. *Am. Farm Bureau Fed'n*, 792 F.3d at 289. Point source is a discrete place where pollutants are discharged. Non-point sources are diffuse sources of pollution such as runoff.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 33 U.S.C. § 1313(d)(1)(C) (2000).

38. *Id.*

39. Larsson & Marks, *Construction and Application of CWA's TMDL*, *supra* note 18.

40. Chesapeake Bay TMDL Document, *Executive Summary*, at 1 (Nov. 20, 2015), https://www.epa.gov/sites/production/files/2014-12/documents/bay_tmdl_executive_summary_final_12.29.10_final_1.pdf [hereinafter Chesapeake Bay TMDL Document].

41. *Id.*; *see generally* 33 U.S.C. § 1313(d)(1)(A)&(C).

42. Sweeny & Armstrong, *Cooperative Federalism in Environmental Law*, *supra* note 21, at 4, 5.

2. Total Maximum “Daily” Loads

Congress granted the EPA broad regulatory authority in the TMDL statute and, consequently, there is not one standard definition that the EPA uses to interpret the TMDL.⁴³ Circuit courts have defined the TMDLs in accordance with the EPA’s broad regulation.⁴⁴ These prior holdings imply a potential for ambiguity in regard to a TMDL definition because courts give deference to the EPA’s different interpretations.⁴⁵ For example, in *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, the First Circuit Court of Appeals stated,

Part of this process requires the development of [the TMDL] for each pollutant that is responsible for a violation of water quality standards. A TMDL is a calculation of the maximum quantity of a pollutant that may be added to a water body from all sources without exceeding applicable water quality standards including “a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.”⁴⁶

The Eighth, Ninth, Tenth, Eleventh, and the D.C. Circuits have similar deferential holdings to the EPA’s interpretation of the TMDL.⁴⁷ The Third Circuit noted that if the statute unambiguously supported the reading of the TMDL as only a bottom line number, the Court would have expected “one of the judges who has presided over TMDL litigation to have noticed the disconnect between the statute and the regulation, but there has been none.”⁴⁸

Federal courts are divided on whether the word “daily” in the phrase “total maximum daily load” is unambiguous.⁴⁹ In response to a challenge to the EPA’s practice of promulgating total maximum seasonal or annual loads, the D.C. Circuit held that the word “daily” was unambiguous and noted the argument that daily meant something other than daily was “tortured.”⁵⁰ After the D.C. Circuit ruled on the definition of “daily,” however, the Second Circuit allowed the EPA to issue total maximum annual or season loads.⁵¹ The Second Circuit reasoned that the relevant statute is silent on whether another timeframe may be used.⁵²

43. *Am. Farm Bureau Fed’n*, 792 F.3d at 296-97; *see generally* 33 U.S.C. § 1251 (2011).

44. *Am. Farm Bureau Fed’n*, 792 F.3d at 295; *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 n.8 (1st Cir. 2012); *Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009) (finding the TMDL in accordance with EPA regulations); *see generally* 33 U.S.C. § 1313(d)(2); *Friends of Earth v. EPA*, 333 F.3d 184, 186 n.5 (finding EPA’s regulations define the TMDL in accordance with statute); *see generally* 40 C.F.R. § 130.2(g)-(i); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (finding EPA’s regulations define the TMDL in accordance with statute); *Hayes v. Whitman*, 264 F.3d 1017, 1021 n.2 (10th Cir. 2001) (noting the EPA recently revised its regulations to give a more detailed definition and the court followed this plan); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (noting the TMDL must be consistent with the terms from EPA).

45. *Am. Farm Bureau Fed’n*, 792 F.3d at 296.

46. *Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 14 n.8.

47. *Am. Farm Bureau Fed’n*, 792 F.3d at 296.

48. *Id.* at 296.

49. *Id.*

50. *Friends of Earth, Inc.*, 446 F.3d at 146.

51. *Am. Farm Bureau Fed’n*, 792 F.3d at 296.

52. *Id.* at 296; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 245 (D.D.C. 2011).

3. Case Study: Lake Champlain TMDL Failures

Lake Champlain is a freshwater lake located on the border of Vermont and Canada. Lake Champlain has five distinct basins, each with its own different chemical makeup.⁵³ Snow runoff contributes to rise and fall of the main lake level each year.⁵⁴ The four shallow basins surrounding the main lake each receive discharge from distinct rivers and bays.⁵⁵ High nutrient levels, shallow waters, and large amounts of sediment contributed to the accumulation of phosphorus in the basins.⁵⁶ Phosphorous creates a low pH and low oxygen level in the water, which in turn allows bacteria and algae to flourish and bloom.⁵⁷

Vermont and New York created the 2002 Lake Champlain Phosphorus TMDL document (2002 TMDL), which was created from an earlier partnership between the respective states and Quebec.⁵⁸ New York and Vermont submitted the 2002 TMDL document to the EPA and, after the agency's approval, moved forward with the goal of cleaning Lake Champlain.⁵⁹ However, litigation challenging the 2002 TMDL for not providing "reasonable assurances" of decline in phosphorus levels, along with unimplemented programs to reduce point source pollution, caused the 2002 TMDL to be a failure.⁶⁰ The lack of accountability destroyed the effectiveness of the 2002 TMDL.⁶¹

4. Accountability Framework – The Chesapeake Bay TMDLs Difference

Beginning in the 1990s, the EPA provided support to local watershed groups and encouraged states to do state-level watershed roundtables.⁶² Since 2000, the seven jurisdictions in the Chesapeake Bay Watershed, the EPA, the Chesapeake Bay Commission, and Chesapeake Bay Program partnered and planned to improve the quality of water in the Chesapeake Bay through the TMDL standard.⁶³

President Obama signed an Executive Order on Chesapeake Bay Protection and Restoration in 2008 (Executive Order).⁶⁴ The Executive Order required the EPA to "examine how to make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters."⁶⁵ In 2010, the EPA responded and published a rule dictating the TMDL of pollution that could be released into the Chesapeake Bay in compliance with the CWA.⁶⁶

53. Mike Winslow, *A Natural and Human History of Lake Champlain*, 17 VT. J. ENVTL. L. 482 (2016).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Winslow, *A Natural and Human History of Lake Champlain*, *supra* note 53, at 482.

59. Matt Chapman & Jen Duggan, *The Transition towards the 2016 Lake Champlain TMDL: A Survey of Select Water Quality Litigation in Vermont From 2003-2015*, 17 VT. J. ENVTL. L. 629 (2016).

60. *Id.*

61. *Id.*

62. Campbell Jones, *Making Regional and Local TMDL's Work*, *supra* note 21, at 288.

63. *Am. Farm Bureau Fed'n*, 792 F.3d at 287. The seven jurisdictions in the Chesapeake Bay watershed are Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia.

64. Campbell Jones, *Making Regional and Local TMDL's Work*, *supra* note 21, at 285.

65. *Id.*

66. *Id.*

The Chesapeake Bay TMDL is a comprehensive framework for pollution reduction designed to bring biological integrity back to the Chesapeake Bay.⁶⁷ The EPA developed its largest ever TMDL standards for the Chesapeake Bay.⁶⁸ The jurisdictions in the Chesapeake Bay watershed agreement identified necessary pollution reductions of nitrogen, phosphorus, and sediment.⁶⁹ The goal of the TMDL is to “fully restore the Bay and its rivers by 2025, with at least 60% of the actions completed by 2017.”⁷⁰

The TMDL is not self-executing but it does serve as the cornerstone for pollution-reduction plans that create enforceable rights and obligations.⁷¹ “Short-term and long-term benchmarks, tracking and accountability systems for jurisdiction activities, and federal contingency actions” are used to ensure cleanup commitments in the Chesapeake Bay are met.⁷² These accountability measures distinguish the Chesapeake Bay TMDL from failed TMDL programs.⁷³

II. ANALYSIS

In 2010, the EPA published a rule dictating the TMDL of pollution that can be released into the Chesapeake Bay in compliance with the CWA.⁷⁴ Trade associations and members that would be affected by the TMDL’s implementation (collectively Farm Bureau) sued the EPA in the District Court for the Middle District of Pennsylvania.⁷⁵ The Farm Bureau alleged that the EPA exceeded the scope of its authority to regulate when the agency issued the TMDL that went beyond an allowable quantity of pollutants.⁷⁶ The Farm Bureau argued that the TMDL should be a bottom line number, and nothing more.⁷⁷ The Third Circuit Court of Appeals held the EPA had not exceeded its authority because “total maximum daily load” was an ambiguous term and the statutory scheme of the CWA suggested that it meant more than a mere number.⁷⁸ Further, the Third Circuit held the district court did not err in applying *Chevron* deference to the EPA because the EPA’s decision was reasonable and reflected a legitimate policy choice.⁷⁹

The Farm Bureau supported its argument through a version of federalism “under which the canons of statutory construction require a court to disfavor any legal interpretation that would push water quality law into the realm of land use regulation.”⁸⁰ The Third Circuit did not accept the Farm Bureau’s argument that

67. *Am. Farm Bureau Fed’n*, 792 F.3d at 287.

68. Chesapeake Bay TMDL Document, *supra* note 40, at 1.

69. *Id.*

70. *Id.*

71. *Am. Farm Bureau Fed’n*, 792 F.3d at 291.

72. Chesapeake Bay TMDL Document, *supra* note 40, at 1.

73. David K. Mears & Rebecca A Blackmon, *Lessons For Lake Champlain From Chesapeake Bay: Returning Both Waters to the “Land of Living,”* 17 VT. J. ENVTL. L. 564 (2016).

74. *Am. Farm Bureau Fed’n*, 792 F.3d at 287.

75. *Id.*; see generally *Am. Farm. Bureau Fed’n*, 984 F. Supp. 2d at 289.

76. *Am. Farm. Bureau Fed’n*, 984 F. Supp. 2d at 294.

77. *Am. Farm Bureau Fed’n*, 792 F.3d 287.

78. *Id.* at 298.

79. *Id.* at 287.

80. Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.

the TMDL grants the EPA the authority to make land-use and zoning regulations.⁸¹ However, the Third Circuit did accept “the general principle that an ambiguous statute should not be construed to change the balance of federal and state authority over land use.”⁸² By partly accepting the Farm Bureau’s asserted canon of construction, the court encouraged “the constitutionalization of the boundary between state land use and federal environmental law.”⁸³ Further constitutionalization of the boundary between state land use and federal environmental law would create judicially-enforced arbitrary lines that inhibit collaboration in the cooperative federalism framework and encourage states’ to exercise their own independent regulations.⁸⁴

A. Procedural History

Trade associations and members who would be affected by the Chesapeake Bay’s TMDL’s implementation sued the EPA in the District Court for the Middle District of Pennsylvania.⁸⁵ The Farm Bureau alleged that the EPA exceeded the scope of its authority to regulate when the agency issued the TMDL that went beyond an allowable quantity of pollutants.⁸⁶ Further, the Farm Bureau argued the TMDL intruded on states’ traditional role in regulating land use.⁸⁷ The Farm Bureau sought declaratory judgment and injunctive relief against the EPA, requesting the District Court vacate the Final TMDL for the Chesapeake Bay.⁸⁸ The District Court denied Farm Bureau’s motion for summary judgment and granted the EPA’s cross-motion for summary judgment.⁸⁹

The Farm Bureau appealed the District Court’s ruling to the Third Circuit Court of Appeals.⁹⁰ The standard of review for a summary judgment is *de novo*.⁹¹ The issue on appeal was, once again, whether the EPA exceeded its authority to regulate when issuing a TMDL with requirements other than a bottom line number.⁹²

B. The Third Circuit’s Analysis

1. Chevron Doctrine

Both parties to *American Farm Bureau Fed’n v. EPA* agreed that the issue in dispute—whether all aspects of the TMDL statute that go beyond an allowable sum of pollutants exceeded the scope of the EPA’s authority to regulate—should

81. *Am. Farm. Bureau Fed’n*, 984 F. Supp. 2d at 298.

82. Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.

83. *Id.*

84. *See generally id.*; Houck, *Cooperative Federalism*, *supra* note 6; Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6.

85. *Am. Farm Bureau Fed’n*, 792 F.3d at 287.

86. *Id.*

87. *Id.*

88. *Am. Farm. Bureau Fed’n*, 984 F. Supp. 2d at 294.

89. *Id.* at 344.

90. *Am. Farm Bureau Fed’n*, 792 F.3d at 287.

91. *Id.* at 292.

92. *Id.*

be governed by the *Chevron* doctrine analysis.⁹³ The *Chevron* doctrine analysis is broken into two steps.⁹⁴ First, the court must determine whether Congress has directly spoken to the precise question at issue.⁹⁵ If the intent of Congress is clear, the analysis ends because the court and the agency must give deference to the unambiguously expressed intent of Congress.⁹⁶ Courts proceed to step two of the *Chevron* doctrine analysis if congressional intent is expressed ambiguously in some way.⁹⁷ Courts give deference to a federal agency's interpretation in step two unless it is arbitrary, capricious, or manifestly contrary to the statute.⁹⁸

For guidance in determining if a statute is unambiguous in step one of the *Chevron* doctrine analysis, a court can look to the plain language of the statute, legislative history, public policy, the purpose of the statute, context, canons of construction, and practical consequences.⁹⁹ The Third Circuit has asked in previous cases "whether the statute unambiguously forbids the Agency's interpretation."¹⁰⁰

Here, the Third Circuit reviewed four areas: case law on the TMDLs, the TMDL statutory text, the statutory structure and purpose of the CWA, and the avoidance canons.¹⁰¹ The Third Circuit began its step one analysis of the *Chevron* Doctrine by reviewing case law to determine if the "total maximum daily load" is an ambiguous term.¹⁰² Whether the TMDL could include more than just a quantity of a pollutant was a case of first impression for the District Court for the Middle District of Pennsylvania.¹⁰³ A working definition for the TMDL did not develop in the Third Circuit between the ruling from the District Court and the appeal in the case at bar.¹⁰⁴ Here, Third Circuit held the EPA's considerable power under complex statutory regimes like the CWA, coupled with consistent determinations that the TMDL is ambiguous, meant that the Court had to continue its step one analysis in the *Chevron* Doctrine.¹⁰⁵

93. *Am. Farm Bureau Fed'n*, 792 F.3d at 294.

94. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Am. Farm Bureau Fed'n*, 792 F.3d at 294. The *Chevron* doctrine applies to an agency's legal interpretation of a federal statute if the agency administers the statute and the statute has the force of law.

99. See generally Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009).

100. *Barnhart v. Walton Fed'n*, 535 U.S. 212 (2002).

101. See generally *Am. Farm Bureau Fed'n*, 792 F.3d 281.

102. *Id.* at 295.

103. *Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 313.

104. *Am. Farm Bureau Fed'n*, 792 F.3d at 295.

105. *Id.* at 297.

2. Plain Language and Purpose of the TMDL

Next, the Third Circuit looked to the plain language of the TMDL statute to determine the meaning of the TMDL.¹⁰⁶ Courts have recognized the EPA's authority to fill the CWA's considerable gaps on how to promulgate the TMDL.¹⁰⁷ The Court found while Congress explicitly required the EPA to establish the TMDL, nowhere does the statute prescribe how the EPA is to implement the TMDL.¹⁰⁸

The Third Circuit then looked to the purpose of the TMDL.¹⁰⁹ The Court noted that eliminating point and non-point source pollution could not be accomplished without certain benchmarks, such as specifying a time period, making decisions, and giving assurance.¹¹⁰ Thus, while the statute never explicitly states that the TMDL can include more than a bottom line number, the goal of the TMDL is broad enough to include "allocations, target dates, and reasonable assurances."¹¹¹

3. Avoidance Canon: Federalism

The final step in the *Chevron* doctrine analysis looks to the avoidance canons, which are based on the concept of federalism.¹¹² The Farm Bureau argued that the TMDL intrudes on an area typically within states' police power: land use.¹¹³ The Farm Bureau contended that the Third Circuit should not allow the EPA's broad construction of the words "total maximum daily load" without a clear statement that Congress intended federal involvement in this realm of state policymaking.¹¹⁴

The Court noted that "waters of the United States" established federal power over interstate waterways, and was so ingrained in society that it has been exercised with the consent of all.¹¹⁵ The basis of the federal power over interstate waterways is the Commerce Clause in the United States Constitution.¹¹⁶ Under the Commerce Clause, Congress may regulate broad categories of activity, including channels of interstate commerce.¹¹⁷ The Chesapeake Bay produces 500 million pounds of seafood every year, leads ships to many port towns, and has an

106. *Id.*

107. *Pronsolino v. Nasti*, 291 F.3d 1123, 1131 (9th Cir. 2002); ("[T]he EPA has the delegated authority to enact regulations carrying the force of law."); *NRDC v. Muszynski*, 268 F.3d 91, 98-99 (2nd Cir. 2001) ("We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application"); *Anacostia Riverkeeper, Inc.*, 798 F. Supp. 2d at 245 ("In light of the CWA's silence on whether applicable criteria must be achieved at all times or may be periodically violated, the Court looks to whether [the] EPA has reasonably resolved the issue.")

108. *Am. Farm Bureau Fed'n*, 792 F.3d at 298.

109. *Id.*

110. *Id.* at 300-01.

111. *Id.* at 298-99.

112. *Id.* at 301; The doctrine of constitutional avoidance is canon law which dictates that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. *Constitutional avoidance*, Black's Law Dictionary, 10th ed. 2014. Cannons are a principle that guides the interpreter of a text used in construing legal instruments, especially contracts and statutes. *Canon*, Black's Law Dictionary, 10th ed. 2014.

113. *Am. Farm Bureau Fed'n*, 792 F.3d at 287.

114. *Id.* at 301.

115. *Id.*

116. U.S. Const. art. I, § 8, cl. 3.

117. *Id.*; *Am. Farm Bureau Fed'n*, 792 F.3d at 304-05.

estimated economic value of more than one trillion dollars.¹¹⁸ The Third Circuit stated there could be no question that the Chesapeake Bay is a source of interstate commerce.¹¹⁹

The Court held that jurisdiction over the Chesapeake Bay is not an issue and thus “the challenge is long on swagger but short on specificity.”¹²⁰ The Court did note, however, that:

Perhaps we would reach a different result if the TMDL in fact made land-use decisions diminishing state authority in a significant way; we might then say that Congress delegated some authority over the definitions of technical terms in the Clean Water Act but not so much discretion as to usurp states’ zoning powers.¹²¹

The Court further noted that the Farm Bureau’s claim that the TMDL impermissibly takes over state power to regulate land is further undermined because the TMDL means of pollution reduction is left to the states, and the limits and allocation recommended by the EPA are only to be used as informational tools.¹²² Thus, the Court reasoned the federal government was not infringing on state land use regulation.¹²³ The Third Circuit rejected the Farm Bureau’s arguments under the avoidance canons.¹²⁴

C. *Chevron Doctrine Analysis Conclusions*

The Third Circuit ultimately held that interpreting the phrase “total maximum daily load” as requiring one bottom line pollution number is not consistent with the CWA’s cooperative federalism goals for both the state and the federal government.¹²⁵ The limited definition impedes the ability of federal and state governments to work together to eliminate water pollution.¹²⁶ Further, the CWA is silent on the meaning and extent to which the EPA can set goals under the TMDL.¹²⁷ In sum, the Third Circuit concluded the phrase the TMDL is ambiguous enough to move to step two of the *Chevron* doctrine analysis.¹²⁸

When a court reaches step two in the *Chevron* doctrine analysis, the court looks to all the arguments made in step one and also the legislative history and reasonableness of the policy choice.¹²⁹ Here, substantial post-enactment legislative history agreed with the EPA’s broad definition of the TMDL.¹³⁰ In assessing the reasonableness of Congress’ policy choice in writing a broad TMDL statute, the Court noted the Farm Bureau did not argue that the policy was unreasonable.¹³¹

118. *Am. Farm Bureau Fed’n*, 792 F.3d at 304-05.

119. *Id.*

120. *Id.* at 302.

121. *Id.*

122. *Id.* at 303.

123. *Am. Farm Bureau Fed’n*, 792 F.3d at 306.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Am. Farm Bureau Fed’n*, 792 F.3d at 306.

129. *Id.* at 307.

130. *Id.* at 308 (“a total maximum daily load or other waste load allocation established under this section”).

131. *Id.*

Thus, the Third Circuit concluded the Farm Bureau's arguments were unpersuasive and it confirmed the "careful and thorough" opinion of the District Court.¹³²

D. Future Impacts of the Avoidance Canon

Even though the Third Circuit affirmed the District Court's holding in favor of the EPA, there is concern in regard to the avoidance canon for land use analysis.¹³³ Here, the Farm Bureau argued that the TMDL statute infringes upon state police powers for land-use and zoning regulations.¹³⁴ Interestingly, the Farm Bureau is collectively made up of the American Farm Bureau Federation, the National Association of Home Builders, and other agricultural industries, but not a state.¹³⁵ As a result, the Farm Bureau's argument in favor of federalism fails.¹³⁶

While the Third Circuit rejected the Farm Bureau's argument in favor of federalism, it seemed to accept "the general principle that an ambiguous statute should not be construed to change the balance of federal and state authority over land use."¹³⁷ Albeit dicta, by partly accepting the Farm Bureau's asserted canon of construction, the Third Circuit encouraged "the constitutionalization of the boundary between state land use and federal environmental law."¹³⁸ Further constitutionalization of the boundary between state land use and federal environmental law would create judicially-enforced arbitrary lines that inhibit collaboration in the cooperative federalism framework and encourage states' to exercise their own independent regulation.¹³⁹

1. Sixty Years of Precedent

As previously noted, environmental law operates under a cooperative federalism framework where the states and the federal government can collaborate on solutions to pollution.¹⁴⁰ The Farm Bureau's argument is that "in the name of federalism," collaboration between states and federal agencies has exceeded its constitutional bounds by intruding on states police powers.¹⁴¹

The costs of judicial review are considerable.¹⁴² If federal courts administering state agency decisions utilize an intrusive standard of review, the federal courts will undermine the standard set out in *Chevron*: where the court gives deference

132. *Id.* at 310.

133. Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.

134. *Am. Farm Bureau Fed'n*, 792 F.3d at 287.

135. *Id.*

136. *Id.* at 310.

137. Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.

138. *Id.*

139. See generally *id.*; Houck, *Cooperative Federalism*, *supra* note 6; Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6.

140. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 2-3.

141. Houck, *Cooperative Federalism*, *supra* note 6, at 10439.

142. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 3-4.

to reasoned agency decision-making.¹⁴³ The dueling sovereigns of state government and federal government will essentially be asking the courts to rule on which sovereign has the most reasonable interpretation of the statute.¹⁴⁴

Further, oversight of this area is equivalent to policymaking decisions made by a legislature.¹⁴⁵ At the heart of the Chevron doctrine there is a “judicial recognition that in matters of policy, administrative agencies are presumptively more suited to the task than courts.”¹⁴⁶ The dispute in Chevron itself—the meaning of a “stationary source” in the Clean Air Act—suggests that “the resolution of ambiguity in a statutory text is often more a question of policy than of law” and should be resolved by policymakers, not the courts.¹⁴⁷

Under the CWA, Congress created a “statutory structure in which the federal and state government interact in synergistic ways.”¹⁴⁸ The partnership between the federal and state government for environmental law is over sixty years old.¹⁴⁹ The Supreme Court has even created special guidelines for interpreting federal statutes that reflect an approval of the cooperative federalism framework.¹⁵⁰ The Supreme Court stated that as long as the federal government leaves a range of choices for the states, there is a presumption in favor of cooperative federalism.¹⁵¹

In the cooperative federalism framework for the Chesapeake Bay, states and the Chesapeake Bay Foundation have made substantial strides in moving the Chesapeake Bay forward to a clean bill of health.¹⁵² While there is still a long road ahead for Chesapeake Bay restoration, the Chesapeake Bay’s water is on a healthier path today.¹⁵³ For example, in 2014, members from the surrounding states signed the Chesapeake Bay Watershed Agreement to keep the Bay on this track.¹⁵⁴

2. Inhibits Collaboration

A benefit of cooperative federalism is experimentation.¹⁵⁵ Congress purposefully left gaps in the CWA to allow a state to tailor approaches to suit its needs and

143. *Id.* at 4.

144. See generally William Yeatman, *Cooperative Federalism Hangs in Balance Before the Supreme Court*, GLOBAL WARMING.ORG (May 6, 2014), <http://www.globalwarming.org/2014/05/06/cooperative-federalism-hangs-in-balance-before-the-supreme-court/>.

145. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 29.

146. *Id.*

147. *Id.*; see generally *Chevron*, 467 U.S. at 842.

148. Laura Kerr, *Compelling a Nutrient Pollution Solution: How Nutrient Pollution Litigation is Redefining Cooperative Federalism Under the Clean Water Act*, 44 ENVTL. L. 1219, 1231 (2014).

149. *Id.* at 1230.

150. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 1.

151. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 727 (2006).

152. Houck, *Cooperative Federalism*, *supra* note 6, at 10,442.

153. Michael W. Fincham, *A Chesapeake Bay Recovery: Half Empty or Half Full?*, CHESAPEAKE QUARTERLY (Dec. 2012), <http://ww2.mdsg.umd.edu/CQ/V11N4/intro/>.

154. See generally Chesapeake Bay Watershed Agreement, CHESAPEAKE BAY PROGRAM (2014) http://www.chesapeakebay.net/channel_files/24858/chesapeake_bay_watershed_agreement.pdf.

155. Glicksman, *From Cooperative Federalism to Inoperative Federalism*, *supra* note 151, at 720.

conditions.¹⁵⁶ For example, the Chesapeake Bay Watershed Agreement is not possible without the cooperative federalism framework: it allowed states to partner with the government, citizens, academic institutions, and local governments to create the best solution for the Bay's waters.¹⁵⁷

The expectation of complete uniformity in the implementation of cooperative federalism statutes is both an undesirable and unattainable goal.¹⁵⁸ There is not a one-size fits all approach.¹⁵⁹ A cooperative federalism plan for the TMDL allowed in the Everglades in Florida will likely not be successful if implemented in the Great Lakes in the Midwest: there are different local priorities, different climates, different terrains, and different sources of pollution.¹⁶⁰

3. Encourages State Supremacy

Case law shows at least six circuit courts ruling in favor of the EPA's broad regulatory authority in implementing the TMDL.¹⁶¹ However, the Third Circuit fueled the lingering idea of state supremacy with their dicta in *American Farm Bureau Federation v. EPA*.¹⁶²

4. Supreme Court Denied Writ of Certiorari

The Supreme Court denied the Farm Bureau's petition from writ of certiorari on February 29, 2016.¹⁶³ This suggests that the Third Circuit correctly examined the canons of statutory construction.¹⁶⁴ However, the Supreme Court lost an opportunity to clarify the Third Circuit's dicta in *American Farm Bureau Federation v. EPA*.

III. CONCLUSION

The Third Circuit did not accept the Farm Bureau's argument that the TMDL statute grants the EPA the authority to make land-use and zoning regulations.¹⁶⁵ The Farm Bureau grounded its argument in its unique version of federalism "under which the canons of statutory construction require a court to disfavor any legal interpretation that would push water quality law into the realm of land use regulation."¹⁶⁶ While the Third Circuit rejected this argument, the Court seemed to accept "the general principle that an ambiguous statute should not be construed to

156. *Id.* at 722-23.

157. *See generally* Chesapeake Bay Watershed Agreement, *supra* note 154.

158. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 3-4.

159. *See generally id.*

160. *Id.*

161. *Am. Farm Bureau Fed'n*, 792 F.3d at 295; *Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 14 n.8 (1st Cir.); *Thomas*, 581 F.3d at 662 (8th Cir.); *Friends of Earth*, 333 F.3d at 186 n.5 (D.C. Cir.); *Sierra Club*, 296 F.3d at 1025 (11th Cir.); *Hayes*, 264 F.3d at 1021 n.2 (10th Cir.); *Dioxin/Organochlorine Ctr.*, 57 F.3d at 1520 (9th Cir.)

162. Houck, *Cooperative Federalism*, *supra* note 6, at 10439.

163. *Am. Farm Bureau Fed'n v. EPA*, 136 S. Ct. 1246 (2016).

164. *Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d 492 (2nd Cir. 2017).

165. *Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 298.

166. Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3.

change the balance of federal and state authority over land use.”¹⁶⁷ By partly accepting the Farm Bureau’s asserted canon of construction, the Third Circuit encouraged the constitutionalization of the boundary between state land use and federal environmental law.¹⁶⁸

The Chesapeake Bay is a model of cooperative federalism success in ecosystem management.¹⁶⁹ Since 2000, the seven jurisdictions in the Chesapeake Bay Watershed, the EPA, the Chesapeake Bay Commission, and Chesapeake Bay Program collaborated and improved the quality of water in the Chesapeake Bay through the TMDL standard.¹⁷⁰ This partnership is the first of its kind and is a resounding success in improving the viability of the Chesapeake Bay.¹⁷¹

Further constitutionalization of the boundary between state land use and federal environmental law would create judicially-enforced arbitrary lines that inhibit collaboration in the cooperative federalism framework and encourage states’ to exercise their own independent regulation.¹⁷² If federal courts engage in an intrusive standard of review in the cooperative federalism framework, the CWA’s goals will be further eroded.¹⁷³ Further, the important benefits that result from experimentation and interstate competition will be lost.¹⁷⁴

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167. *Id.*

168. *Id.*

169. See generally Campbell Jones, *Making Regional and Local TMDL’s Work*, *supra* note 11.

170. *Am. Farm Bureau Fed’n*, 792 F.3d at 287.

171. See generally Campbell Jones, *Making Regional and Local TMDL’s Work*, *supra* note 11.

172. See generally Owen, *Two Interesting Things About the Chesapeake Bay TMDL Decision*, *supra* note 3; HOUCK, *Cooperative Federalism*, *supra* note 6; Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6.

173. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, *supra* note 6, at 4.

174. Glicksman, *From Cooperative Federalism to Inoperative Federalism*, *supra* note 151, at 720.

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