Anacostia Riverkeeper, Inc. v. Wheeler: The D.C. District Court Deepens the Split over Whether the Term "Total Maximum Daily Load" Is Ambiguous

I. OVERVIEW

Congress enacted the Clean Water Act (CWA or Act) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] The Act depends on a visionary structure of cooperative federalism to implement its lofty goal, requiring states to develop and submit water quality standards to the Environmental Protection Agency (EPA) for approval.[2] A fundamental part of this cooperative scheme is Section 303(d) of the Act, which requires states to identify impaired waterbodies, i.e., those that fail to meet water quality standards with existing technology-based limitations.[3] Placing a waterbody on a so-called "303(d) list" triggers the state's obligation to calculate total maximum daily loads (TMDLs) for each pollutant that threatens or impairs the waterbody.[4] A TMDL establishes the maximum amount of a particular pollutant that can enter the waterbody without violating water quality

1. 33 U.S.C. § 1251(a) (2018).
2. *See* 33 U.S.C. § 1313(a) (2018).
3. 33 U.S.C. § 1313(d)(1)(A) (2018).
4. 33 U.S.C. § 1313(d)(1)(C) (2018).

standards; this limitation serves as a starting point for restoring water quality in impaired bodies.[5]

In 2004, the EPA approved TMDLs for fecal bacteria in the Anacostia and Potomac Rivers, establishing annual loads and maximum monthly loads.[6] However, the D.C. Circuit held in 2006 that the CWA established a clear directive to set total maximum *daily* loads; thus, the 2004 fecal bacteria TMDLs were insufficient.[7] The District of Columbia (the District) revised the TMDLs to include two sets of figures for *E. coli* pollutant limits: an annual load limit and daily load expressions.[8] The TMDLs explained that the daily load expressions represented "a value which when exceeded indicates [a] *likelihood* that water quality will not be attained."[9] Though the EPA approved these TMDLs, District of Columbia Water and Sewer Authority (DC Water)—the owner and operator of Blue Plains wastewater treatment facility—challenged this approval.[10] DC Water alleged that daily load allocations for the facility were set too low.[11] In response, the EPA indicated in its revised rationale that the daily expressions did not represent "never-to-be-exceeded-on-a-daily-basis" targets.[12] Subsequently, environmental groups filed suit against the EPA alleging that the TMDLs for *E. coli* bacteria in the Anacostia and Potomac Rivers were insufficient to meet the requirements set out in the CWA.[13] DC Water intervened as a defendant.[14] All parties then moved for summary judgment.[15] The District Court for the District of Columbia *held* that the EPA violated the plain language of the Clean Water Act and acted arbitrarily and capriciously when it approved the TMDLs that failed to establish daily maximum discharge limits; the court further held that the EPA unreasonably assumed that achievement of numeric water quality criteria would automatically lead to achievement of narrative criteria.

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5. *Id.*; *see also Overview of Total Maximum Daily Loads*, EPA (last updated Sept. 13, 2018), https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls [https://perma.cc/EUT9-5AAU?type=image].

6. Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160, 166 (D.D.C. 2019).

7. *Id.* (citing Friends of the Earth v. EPA, 446 F.3d 140 (D.C. Cir. 2006) (holding that the plain language of the CWA requires states to set daily pollutant limits for impaired waterbodies)).

8. *Wheeler*, 404 F. Supp. 3d at 167.

9. *Id.* (quoting D.C.'s TMDL submission to EPA No. 0011839 (emphasis added)).

10. *Wheeler*, 404 F. Supp. 3d at 168. Blue Plains is the largest advanced wastewater treatment facility in the world. *Id.* at 166.

11. *Id.* at 168.

12. *Id.* at 169 (quoting EPA's revised decision rationale No. 0013939).

13. *Id.* at 163.

14. *Id.*

15. *Id.*

Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160 (D.D.C. 2019).

II. BACKGROUND

Under the CWA's statutory scheme, states are required to develop water quality standards for the waterbodies within their borders.[16] Water quality standards contain two elements: water quality criteria and designated uses.[17] Water quality criteria are measures of the conditions of a waterbody, while designated uses reflect the manner in which the water is to be utilized.[18] Water quality criteria can be expressed in numeric or narrative terms.[19] For example, the District of Columbia has four water quality criteria for *E. coli*,[20] two of which are numeric,[21] and two of which are narrative.[22] The National Pollutant Discharge Elimination System (NPDES) enforces the water quality criteria by requiring point source dischargers to obtain the proper permit before discharging effluent into any waters of the United States.[23]

If the state determines that a waterbody is impaired, it must develop a TMDL that specifies "the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards."[24] This translates into wasteload and load allocations. A wasteload allocation is the amount of allowable effluent discharge from point sources, whereas a load allocation is the amount of allowable pollution from non-point sources.[25] The sum of these allocations constitutes the TMDL.[26] A TMDL is not self-executing, however; the permitting agency is required to grant permits "consistent with the assumptions and requirements of any available wasteload allocation."[27]

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16. 33 U.S.C. § 1313(a) (2018).
17. *See* Anacostia Riverkeeper, Inc. v. Jackson, 798 F. Supp. 2d 210, 215 (D.D.C. 2011) [hereinafter referred to as *Jackson*].
18. *Id.*
19. 40 C.F.R. § 131.3(b) (2019).
20. *Wheeler*, 404 F. Supp. 3d at 165.
21. *Id.* at 165-66 (explaining that the relevant numeric criteria set a geometric mean and a single sample value for *E. coli* concentration in the District's waters).
22. *Id.* at 165 (quoting D.C. Mun. Reg. 21 §§ 1101, 1199) (E.g., "[t]he surface waters of the District shall be free from substances in amounts or combinations that . . . [c]ause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans[.]").
23. 33 U.S.C. § 1342, 1362(14) (2018) ("The term 'point source' means any discernible, confined and discrete conveyance.").
24. *Jackson*, 798 F. Supp. 2d at 216 (citing 33 U.S.C. § 1313(d)(1)(C)).
25. 40 C.F.R. §§ 130.2(g)-(h) (2019).
26. *Id.* § 130.2(i).
27. 40 C.F.R. § 122.44(d)(1)(vii)(B) (2019).

Additionally, the EPA retains oversight of state-developed TMDLs.[28] This means the EPA must either approve or deny a TMDL, and if it denies a state's proposed TMDL, the EPA is required to develop a replacement.[29] The EPA's approval or denial of a TMDL is subject to judicial review under the Administrative Procedure Act, which requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]"[30]

A. Chevron Doctrine

In *Chevron, Inc. v. Natural Resources Defense Council*, a case involving a unique interpretation of the term "stationary source" under the Clean Air Act, the Supreme Court established a two-step analysis to determine the level of judicial deference afforded to an agency's statutory interpretation.[31] Step one of the *Chevron* analysis requires the court to ask whether Congress has spoken directly to the issue; if so, the agency "must give effect to the unambiguously expressed intent of Congress."[32] However, if the reviewing court determines that Congress did not answer the precise question at issue, step two of the *Chevron* analysis directs courts to refrain from substituting the agency's interpretation with its own.[33] When Congress leaves a gap in a statute, agencies are left with the discretion to flesh out the meaning of the legislation by promulgating regulations; statutory ambiguities are indicative of Congress's express delegation of discretionary authority to the agency.[34] Thus, the proper inquiry for the court in step two of the analysis is whether the agency's interpretation is a reasonable construction of the statutory term.[35]

Some commentators have noted in response to the Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) that there appears to be a threshold step zero in the *Chevron* analysis—namely, whether the doctrine applies at all.[36] In *Mead*, the Court limited the application of

28. *Overview of Total Maximum Daily Loads*, *supra* note 5.
29. *Id.*
30. Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160, 169 (D.D.C. 2019) (quoting 5 U.S.C. § 706(2)(A)).
31. 467 U.S. 837, 840, 842-43 (1984).
32. *Id.*
33. *Id.*
34. *Id.* at 843-44.
35. *Id.*
36. *See*, *e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

Chevron to cases in which it appears that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[37]

Recent additions to the Supreme Court have further questioned the applicability of *Chevron*. Justices Brett Kavanaugh and Neil Gorsuch, for example, have both criticized the doctrine, arguing that it is an abandonment of a court's Article III duty to independently interpret the law.[38] Kavanaugh and Gorsuch also argue that *Chevron* impermissibly extends the power of the executive beyond constitutional limits.[39] For example, Justice Gorsuch recently broadened step one of *Chevron* in his majority opinion in *Wisconsin Central Limited v. United States*, holding that "in light of the textual and structural clues . . . it's *clear enough* that the term 'money' excludes 'stock,' leaving no ambiguity for the agency to fill."[40] This "clear enough" standard aligns with Justice Kavanaugh's approach to statutory ambiguities, as he claims "to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others . . . I probably apply something approaching a 65-35 rule."[41] Such critiques obscure the future of the *Chevron* doctrine, and likely open the door for the Supreme Court to revisit its validity in the near future.

B. Total Maximum Daily Load: An Ambiguous Term?

There remains a split in the circuits over whether the term "total maximum daily load" is an ambiguous statutory term that results in agency

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37. Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, LEGAL PLANET (Oct. 23, 2017), https://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-chevron-doctrine/ [https://perma.cc/BA6W-H4ZL?type=image] (quoting *Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

38. Michael McConnell, *Kavanaugh and the "Chevron Doctrine,"* THE HOOVER INSTITUTE: DEFINING IDEAS (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine [https://perma.cc/S48F-TW54?type=image].

39. *Id.*

40. 138 S. Ct. 2067, 2074 (2018) (emphasis added); *see also* Christopher J. Walker, *Gorsuch's "Clear Enough" & Kennedy's Anti-"Reflexive Deference": Two Potential Limits on Chevron Deference*, YALE J. ON REG.: NOTICE & COMMENT (June 22, 2018), https://www.yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/ [https://perma.cc/R8L7-D735?type=image].

41. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137-38 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

deference.[42] For example, in *Natural Resources Defense Council v. Muszynski*, the Second Circuit asked whether, under the plain language of the CWA, the term TMDL is susceptible of multiple meanings.[43] The Second Circuit held that the entire term *is* susceptible of a broad range of meanings, so the TMDL in question was not required to be expressed in terms of daily loads.[44] Notably, the court explained that the phrase should be read in the context of the entire Act, requiring the statute to "be interpreted in a way that avoids absurd results."[45] As such, the Second Circuit reasoned that the EPA may express TMDLs by "another measure of mass per time," where such measure best serves the purpose of regulating pollutant levels.[46] The court remanded the TMDL back to the agency to provide a rationale as to why it was appropriate for the phosphorus TMDL to be expressed in annual terms.[47]

The D.C. Circuit visited a similar question in the 2006 case, *Friends of the Earth v. EPA*, when the court evaluated the EPA's approval of an annual and a seasonal TMDL for dissolved oxygen and turbidity in the Anacostia River.[48] The D.C. Circuit held that such annual and seasonal TMDLs contravened the plain language of the CWA, which uses the language "total maximum *daily* loads."[49] The court reasoned: "Doctors making daily rounds would be of little use of their patients if they appeared seasonally or annually. And no one thinks of '[g]ive us our daily bread' as a prayer for sustenance on a seasonal or annual basis."[50] Under the *Chevron* standard, the D.C. Circuit's finding that annual and seasonal TMDLs contradicted the express language of the CWA foreclosed the EPA's interpretation of the Act in approving such TMDLs because Congress was unambiguous in the directive to set *daily* loads.[51] The D.C. Circuit's conclusion in *Friends of the Earth* stands in direct contrast to the Second Circuit's conclusion in *Muszynski*, wherein the court reasoned that Congress provided the EPA with the discretion to express TMDLs in

42. *See* Petition for Writ of Certiorari at 30-31; Am. Farm Bureau Fed'n v. EPA, 136 S. Ct. 1246 (2016) (No. 15-599) (*denying cert.*); *see also* Nat. Res. Def. Council v. Muszynski, 268 F.3d 91, 98-99 (2d Cir. 2001).

43. 268 F.3d at 98-99.

44. *Id.*

45. *Id.* at 98 (quoting United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000)).

46. *Id.* at 99.

47. *Id.*

48. Friends of the Earth v. EPA, 446 F.3d 140, 143 (D.C. Cir. 2006).

49. *Id.* at 144.

50. *Id.*

51. *Id.* at 145.

periods of time other than by day.[52] Subsequent D.C. District Court opinions have ruled that *Friends of the Earth* forecloses out-of-circuit precedents to argue that the term as a whole is susceptible to multiple meanings.[53]

More recently, the Third Circuit held in the landmark TMDL case *American Farm Bureau Federation v. EPA* that the word "total" is susceptible to multiple meanings and that TMDL is an ambiguous term.[54] In *American Farm Bureau*, the Farm Bureau sued the EPA over the Chesapeake Bay TMDL, alleging that the phrase "total maximum daily load" is unambiguous and therefore requires a TMDL to be expressed as one numeric total.[55] The Farm Bureau argued that the unambiguous nature of the phrase foreclosed the EPA's approval of a TMDL that included elements such as allocations of pollution levels among different sources, timeframes for compliance, and assurance provisions.[56] Applying step one of the *Chevron* doctrine, the Third Circuit determined that the word "total" is susceptible to multiple meanings.[57] Thus, the court deferred to the EPA's interpretation because Congress "wanted an expert to give meaning to the words it chose."[58] These various answers to the question of whether "total maximum daily load" is ambiguous have ultimately created an unresolved circuit split over whether the EPA's interpretation in these scenarios is entitled to judicial deference.

III. COURT'S DECISION

In the noted case, the D.C. District Court revisited the issue of whether the directive to set total maximum daily loads is ambiguous considering the statutory language in the CWA. The court held that, under the plain language of the CWA, "total maximum daily load" is an unambiguous term that requires states to establish a daily figure which "represents the greatest amount of pollutant that can be discharged into a water body on any given day without causing a violation of the water quality standards."[59] As a result, the court reasoned that the District's *E. coli* TMDLs were insufficient because they failed to set a fixed amount of

52. *See* Nat. Res. Def. Council v. Muszynski, 268 F.3d 91, 99 (2d Cir. 2001).
53. Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160, 172 (D.D.C. 2019) (citing Nat. Res. Def. Council v. EPA, 301 F. Supp. 3d 133, 142-43 (D.D.C. 2018)).
54. Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281, 298 (3d Cir. 2015).
55. *Id.* at 287.
56. *Id.* at 295.
57. *Id.* at 298.
58. *See id.*
59. Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160, 172 (D.D.C. 2019).

a pollutant that can be discharged during one day without violating water quality standards; rather, the TMDLs created a variable maximum daily load modeled off of a thirty-day geometric mean.[60] Finally, the court held that the EPA acted arbitrarily and capriciously in approving the TMDLs because the EPA unreasonably assumed that achievement of numeric water quality criteria would necessarily lead to achievement of narrative criteria.[61]

A. The TMDLs Failed to Establish True Total Maximum Daily Loads

Under *Chevron*, an agency's interpretation of a statute is entitled to judicial deference if Congress has failed to address the "precise question at issue."[62] As such, when a court is asked to interpret the CWA's statutory command, it does not write on a blank slate; if the statutory language is clear, such language must control.[63] Thus, one of the primary issues in the noted case is whether the term "total maximum daily load" is an ambiguous term.[64] Here, the court was bound by D.C. Circuit precedent holding that the plain language of the CWA requires states to set daily pollutant limits for impaired waterbodies.[65] The court further reasoned that each individual word in the phrase has an ordinary, unambiguous meaning, making the phrase as a whole unambiguous[66]—it requires that pollutant limits be expressed as daily limits.[67] As such, the EPA's rationale for approval was not subject to deference under *Chevron*; rather, Congress's directive controlled the analysis.[68] Given that the EPA's interpretation was not entitled to judicial deference, the court next turned to the issue of whether the District's TMDLs complied with the plain language of the CWA.[69] Thus, the question for the court was whether the District's TMDLs

60. *Id.* at 173.
61. *Id.* at 187.
62. *Id.* at 170 (quoting Chevron, Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842 (1984)).
63. *Id.* at 171.
64. *Id.*
65. *Id.* at 171 (citing Friends of the Earth v. EPA, 446 F.3d 140 (D.C. Cir. 2006)).
66. *Id.* at 171-72 ("'Load' is similarly unambiguous, representing 'the quantity that can be . . . carried at one time by an often specified means of conveyance' or 'a measured quantity of a commodity fixed for each type of carrier[.]'") (quoting *Load*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1325 (2002)).
67. *Id.* at 172-73 (citing Anacostia Riverkeeper, Inc. v. Jackson, 713 F. Supp. 2d 50, 51 (D.D.C. 2010)).
68. *Id.* at 170 (citing Chevron, Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43(1984)).
69. *Id.* at 173.

actually expressed maximum *E. coli* pollutant limits in daily terms.[70] The TMDLs were calculated based on the District's numeric water quality criteria for *E. coli* that set a maximum 126 MPN/100mL geometric mean of five water samples taken over a thirty-day period.[71] The "Daily max" figure, which served as the District's supposed daily expression, was based on modeled loads of *E. coli* predicted to meet the established 30-day geometric mean.[72] Thus, the court explained, the maximum is not expressed in any fixed term, "but can vary day to day based on previous days' discharges."[73] Here, the court found an analogy instructive.

The court asked the parties to "[i]magine a family seeking to rein in its spending. To that end, it budgets $500 a month for groceries. But it keeps blowing past that cap, so it ties itself to the mast: it sets a daily maximum of $30 to help achieve the $500 monthly budget."[74] The court further explained that the family knows it cannot spend that much each day without blowing the $500 budget, but "it wants to make sure the occasional steak night doesn't get out of hand."[75] Using this analogy, the court turned to the EPA's argument and stated:

> [The EPA] insists that, because the $500 monthly budget is always met, the family necessarily has a variable daily maximum. Simply subtract the previous 29 days' spending from $500 and see what remains. True enough, but the $500 budget is not met because of any daily maximum; instead, it is met through adherence to separate *non-daily* caps. EPA's approach would allow the family to set a *weekly* maximum of $200 to achieve its $500 monthly budget, and then used that achievement to say that a variable *daily* maximum always exists—perhaps $10, perhaps $30, perhaps $70.[76]

Such an approach, the court reasoned, "turns the CWA's requirement on its head."[77] In direct contrast to the requirement that the number represent a daily maximum of effluent that can still achieve the monthly budget, the EPA did not consider the TMDLs' daily expressions to be "never-to-be-exceeded-on-a-daily-basis" targets or figures.[78] The EPA

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70. *Id.*
71. *Id.*
72. *Id.* at 169 (citing EPA No. 0013939).
73. *Id.* at 173.
74. *Id.* at 174.
75. *Id.*
76. *Id.*
77. *Id.*
78. *See id.* at 176 (quoting EPA No. 0013939); *see also id.* at 171 ("'Maximum' means . . . 'an upper limit allowed by law or other authority' or 'the greatest quantity or value attainable in a given case.'") (quoting *Maximum*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

further discounted "the assumption that the TMDLs' [allocations] set a maximum or ceiling on *E. coli* loads during any given 24-hour period."[79] As the court explained, this interpretation does not comport with the plain language of the CWA.[80] Under the CWA, when a state fails to meet water quality standards, it must develop and implement TMDLs, which in turn must be incorporated into NPDES permits.[81] If a TMDL sets a variable maximum in lieu of a fixed maximum, then there is functionally no difference between the statutorily imposed TMDL process and the previous scenario wherein the state failed to meet water quality standards.[82] As a result, the court ruled that the TMDLs were not set in accordance with the Act because the TMDLs' variable maximum failed to follow the congressional directive under the CWA.[83]

The court further analyzed the impact its ruling would have on the permitting process.[84] First, the court rejected the EPA's contention that the underlying water quality standard is not suitable for daily pollutant limitations, reasoning that the courts are not the proper venue to resolve this matter[85] because the CWA gives the EPA Administrator discretion to choose which pollutants are subject to TMDLs,[86] and if the EPA thinks that a particular pollutant is not best regulated by the setting of a daily maximum, it can change that through the regulatory scheme imposed by Congress.[87] The court also rejected DC Water's argument that its ruling would undo a decade of TMDL development and investment.[88] This rejection was due in part to the EPA's position that the holding in *Friends of the Earth v. EPA* does not require changes to permitting because current regulations "do not necessitate permits and TMDLs to be mirror images of one another."[89] Additionally, the court reasoned that because permits are designed to achieve water quality standards, facilities presumably are already complying with the maximum daily load.[90] Otherwise, the

79. *Id*. at 170 (quoting EPA No. 0013939).
80. *See id.* at 174.
81. *Id.* at 175; *see also* 33 U.S.C. § 1313(d)(1)(A), (C).
82. *See Wheeler*, 404 F. Supp. 3d at 174 ("The situation would be no different if these daily expressions in the TMDLs did not exist at all.").
83. *See id.*
84. *See id.* at 180.
85. *See id.*
86. *Id.*; *see* 33 U.S.C. § 1313(d)(1)(C).
87. *Wheeler*, 404 F. Supp. 3d at 180.
88. *Id.*
89. *Id.* at 181.
90. *Id.*

maximum allocation is too low or current pollution controls are insufficient to achieve water quality standards.[91] Thus, the court granted the plaintiffs summary judgment on the issue of whether the TMDLs imposed a daily maximum as required by the CWA, holding that the TMDLs were insufficient under the plain language of the Act.[92]

B. The TMDLs Failed to Achieve All Applicable Water Quality Standards

The plaintiffs in the noted case also challenged approval of the TMDLs on the basis that such TMDLs failed to achieve underlying water quality standards.[93] Under the CWA, Congress requires TMDLs to be established "at a level necessary to implement applicable water quality standards."[94] Here, the plaintiffs alleged that the EPA acted arbitrarily and capriciously when determining "that achievement of the 30-day geometric mean numeric standard sufficed to achieve the two narrative criteria."[95] The court reasoned that, while achievement of the numeric criteria is *necessary* to achieve underlying designated uses, it is not *sufficient*.[96] Rejecting the notion that numeric criteria can serve as a proxy for satisfaction of narrative criteria, the court noted, "[t]he narrative criteria at issue are not only measurable but have to be measured."[97] As a result, the court ruled that the EPA acted arbitrarily and capriciously in concluding that the District's TMDLs achieved underlying narrative water quality criteria.[98] Additionally, the court determined that the proper remedy would be to stay the vacatur of the TMDL for one year to give the EPA time to revise its TMDLs, reasoning that it is better to have the inadequate TMDLs in place "than no limits at all."[99]

IV. ANALYSIS

The noted case presents a number of complex issues of law, most of which hinge on the fate of the *Chevron* doctrine.[100] In accordance with step one of the *Chevron* analysis, which asks whether Congress has spoken to

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91. *Id.*
92. *Id.* at 189.
93. *Id.* at 185.
94. *Id.* at 165 *(quoting* 33 U.S.C. § 1313 (d)(1)(C)).
95. *Id.* at 186.
96. *Id.*
97. *Id.* at 187.
98. *Id.*
99. *Id.* at 189.
100. *See generally* Chevron, Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984).

the precise question at issue,[101] the court in *Anacostia Riverkeeper* was required to examine whether Congress spoke to the issue of whether calculating TMDLs based on average flow rates is permissible.[102] Unlike other courts, the D.C. District Court saw no opportunity for ambiguity in Congress's directive to set a maximum daily load.[103] However, TMDLs involve complex questions of science and analytics, as illustrated by the noted case.[104] These TMDLs were developed over the course of a decade, undergoing several revisions and public comment periods.[105] The EPA determined that the best way to regulate the particular pollutant, *E. coli*, was primarily through annual and monthly loads.[106] Arguably, this is the exact kind of deference *Chevron* is meant to afford.[107] However, the court's response to this line of argument is persuasive—Congress included a provision in the CWA that grants the EPA Administrator discretion to determine which pollutants are subject to TMDLs.[108] If *E. coli* is so ill-suited to be regulated by a daily maximum, Congress explicitly gave the EPA a way to avoid setting a daily pollutant limit that does not require distorting the statutory language in the CWA.

This line of reasoning could lead to a decrease in environmental protection. For example, in *Natural Resources Defense Council v. EPA*, the D.C. District Court vacated a TMDL for trash because it required the removal of trash.[109] The court reasoned that removal of a pollutant is not consistent with the term "load" in "total maximum daily load" because the term implies that "an amount of matter . . . is introduced into a receiving water."[110] Accordingly, the court ruled that this TMDL ran contrary to the plain language of the CWA.[111]

Additionally, in jurisdictions where the issue of TMDLs' ambiguity is unresolved, such ambiguity could potentially be a powerful tool for

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101. *Id.* at 842.
102. *Wheeler*, 404 F. Supp. 3d at 172.
103. *Id.* at 171.
104. *See id.* at 173.
105. *Id.* at 166-67, 180.
106. *Id.* at 180.
107. *See* Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281, 296 (3d Cir. 2015) ("[T]he Supreme Court has held that *Chevron* deference is appropriate where an agency is charged with administering a complex statutory scheme requiring technical or scientific sophistication.") (citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002-03 (2005)).
108. *Id.* at 297.
109. 301 F. Supp. 3d 133, 145 (D.D.C. 2018).
110. *Id.* at 141-42 (quoting 40 C.F.R. § 130.2(e) (1989)).
111. *Id.* at 142.

regulated entities. For instance, in *American Farm Bureau*, the plaintiffs were agricultural interest groups who wanted the TMDL vacated on the basis of the CWA's unambiguous requirements.[112] They alleged that controls such as compliance schedules were precluded because TMDLs are required to be expressed in one numerical daily total.[113] If the court had agreed and concluded that the term was unambiguous, the case could have foreclosed the inclusion of critical pollution control mechanisms within the TMDL regime. In contrast, the D.C. District's approach in the noted case leads to better environmental protection.[114] Under the District's 2014 *E. coli* TMDL, a facility would have been able to meet the TMDL by achieving compliance the 30-day geometric mean; this would allow a facility to release a concentrated amount of pollution in a short timeframe, so long as that facility reduces discharges for the rest of the month.[115] Such a result would contravene the goals envisioned by Congress in imposing a total maximum daily load for impaired waterbodies.

V. CONCLUSION

The noted case presents a curious question at the intersection of the *Chevron* doctrine and the CWA's scheme of cooperative federalism: Did Congress leave room for interpretation in its directive to develop TMDLs? The future of the TMDL program rests on this question of statutory interpretation and, notably, a doctrine that newer Supreme Court justices have criticized as unconstitutional.[116] The noted case only deepens the circuit split over whether the term "total maximum daily load" is ambiguous by ruling that the term forecloses a variable daily maximum.[117] The D.C. District's conclusion stands in contrast to decisions by other courts that have upheld the EPA's approval of non-daily TMDLs on the basis of agency deference.[118] If the Supreme Court chooses to settle this dispute, the result will almost certainly be contingent on how Justices Kavanaugh and Gorsuch—and newly appointed Justice Amy Coney Barrett—interpret the *Chevron* doctrine. If it is held to be an ambiguous term, environmental agencies will have more leniency in administering an

112. *Am. Farm Bureau Fed'n*, 792 F.3d at 294.
113. *Id.*
114. *See* Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160 (D.D.C. 2019).
115. *See id.* at 173.
116. *See* McConnell, *supra* note 38.
117. *Wheeler*, 404 F. Supp. 3d at 171-72.
118. *See, e.g.*, Nat. Res. Def. Council v. Muszynski, 268 F.3d 91, 98-99 (2d Cir. 2001) ("We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis.").

already administratively complex program; alternatively, if the Supreme Court were to hold that Congress spoke clearly to the issue at hand, agencies may have to rework current practices in significant ways. Because the TMDL program is arguably one of the CWA's biggest successes, the future of America's waters could depend on that interpretation.

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