CASE NOTE: AMERICAN FARM BUREAU FEDERATION V. UNITED STATES EPA[1]

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Introduction

The Chesapeake Bay is the largest estuary in North America and has been an environmental concern for years due to heavy amounts of pollution.[2] The Clean Water Act (CWA) was passed in 1972 in order to help combat pollution in the nation's waters with the ambitious goal of cleaning the nation's waterways by July 1, 1983.[3] While the CWA was not successful in cleaning all of the nation's waters by 1983, it is generally considered to be successful.[4] However, the CWA has not been very successful in regulating nonpoint source pollution, which is the main reason the Chesapeake Bay is on the EPA's impaired waters list.[5] In 2012, the Environmental Protection Agency (EPA) concluded that approximately 74% of the Chesapeake Bay was partially or full impaired by toxic contaminants.[6] A few of the most problematic pollutants for the Chesapeake Bay have been nitrogen, phosphorus, and sediment.[7] Agricultural pollution is the largest source of these contaminants in the Chesapeake Bay.[8] Because the Chesapeake Bay's watershed extends over 64,000 miles,[9] the EPA worked together with Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia (DC) to improve the water quality of the Chesapeake Bay, areas which all contribute to the pollution levels of the Bay.[10]

The CWA requires the EPA, or the states who have been delegated authority, to establish "total maximum daily loads" (TMDL) for waterways that are impaired and cannot be brought

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[2] *American Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 287 (3rd Cir. 2015).
[3] 33 U.S.C. 1251 (a) (2).
[4] Sarah Brull, *An Evaluation of Nonpoint Source Pollution Regulation in the Chesapeake Bay*, 13 U. Balt. J. Envtl. L. 221 (2006).
[5] *Id.* at 221-222.
[6] *Toxic Contaminants Policy and Prevention*, Chesapeake Progress, (last visited Nov. 14, 2017), http://www.chesapeakeprogress.com/clean-water/toxic-contaminants-policy-and-prevention.
[7] *Pollution*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/state/ pollution.
[8] *Agriculture*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/issues/ agriculture.
[9] *Watershed*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/ discover/watershed.
[10] *American Farm Bureau Fed'n*, 792 F.3d at 287.

into attainment by regulating point sources only.[11] For the Chesapeake Bay, the watershed states agreed not to submit TMDLs in order to allow the EPA to establish them.[12] Environmental protection organizations and trade associations often challenge action by the EPA and in *American Farm Bureau Federation v. United States EPA, 792 F.3d 281 (3rd Cir. 2015)*, several trade associations challenged the TMDLs put in place by the EPA, arguing that the EPA could not impose limits on point and nonpoint sources, get assurances that watershed states would meet specified limits, and include target dates to achieve the specified limits.[13]

The Third Circuit Court had to determine what the CWA meant by the term "total maximum daily load."[14] The American Farm Bureau Federation and other trade groups (American Farm Bureau Federation) argued that TMDL meant a single number that represented the amount of each pollutant that was allowed to be discharged, arguing that the EPA overstepped its authority by including target dates, assurances, and regulation of point and nonpoint sources.[15] The case was decided under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), which states that if Congress has specifically addressed the issue, the court and the agency must give full effect to Congress' unambiguously expressed intent. However, if the statute is silent on the issue, the agency's interpretation will be given controlling weight unless arbitrary, capricious, or manifestly contrary to the statute.[16] Because Congress did not specify how the EPA was to implement TMDLs, the EPA chose notice and comment rulemaking, and if the EPA had not included decision-making factors, the EPA would probably not have met the requirements under the Administrative Procedure Act (APA).[17] The court concluded that

[11] *Id.* at 288.
[12] *Id.* at 289.
[13] *Id.* at 292.
[14] *Id.* at 290.
[15] *Id.* at 294.
[16] *Id.* at 294-295.
[17] *Id.* at 298.

Congress intended the EPA to fill gaps left in the CWA.[18] It also decided that the TMDLs were consistent with the CWA's purpose, the Commerce Clause in the constitution, and other Supreme Court cases.

American Farm Bureau Federation was a well-thought-out and consistent opinion with the law, so the Third Circuit was right in upholding the EPA's TMDLs which included regulation of point and nonpoint sources, assurances from the watershed states, and target dates for implementation. When the Third Circuit upheld the TMDLs and the Supreme Court declined to hear the case, it was a great step towards achieving meaningful cleanup of the Chesapeake Bay. This decision could impact other waterways by allowing and encouraging the EPA to get assurances that states will meet the pollution limits and by including target dates for cleanup. The decision encourages state and federal cooperation, as promoted by the CWA, which could lead to less polluted waterways and fewer lawsuits challenging the EPA's authority to impose such limits. It does have possible negative implications on business because of heightened restrictions on pollution, but having less-polluted waterways is positive for everyone in the long term.

Reporting

A. *Chesapeake Bay Background*

The Chesapeake Bay is the largest estuary in North America, and its watershed is approximately 64,000 square miles and contains thousands of tributaries.[19] The Chesapeake Bay has been an environmental concern for many years.[20] In 1950, about 7,000,000 people lived in the Chesapeake Bay watershed and the population is projected to reach 20,000,000 by 2030.[21] In

[18] *Id.*
[19] *American Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 287 (3rd Cir. 2015).
[20] *Id.*
[21] *Id.* at 288.

addition to maintaining this growing population, it also supports massive industries within the watershed, including fishing, shipping, farming, and tourism.[22] The increase in growth of these industries has led to an overwhelming amount of pollution, causing dead zones, opaque water, and algae blooms, which have left portions of the Chesapeake Bay unable to support life.[23]

B. *The Clean Water Act and the Environmental Protection Agency*

In 1972, Congress passed amendments to the CWA, which created a framework for states and the federal government to work together to clean the Nation's waters.[24] In the decades since, the EPA, Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and DC, which is considered a state for purposes of the CWA, have developed plans to improve the water quality of the Chesapeake Bay.[25] The CWA gives the EPA responsibility for regulating point sources[26] by establishing effluent limitations[27] under Section 1313.[28] This section is intended to be the main law for controlling water pollution.[29] The states regulate nonpoint sources[30] with input from the EPA.[31] Where effluent limits are not enough to bring waterways into attainment, Section 1313 requires the states to submit a list of impaired waterways to the EPA, where effluent limits and technology-based controls are insufficient to meet water quality standards.[32] Under Section 1313(d) (1)(A) & (C), the CWA requires the EPA to establish "total maximum

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 288.
[25] *Id.* at 287.
[26] Point Source means "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are discharged." 33 U.S.C. § 1362 (14).
[27] Effluent limitations are caps on pollution that apply only to stationary sources. *American Farm Bureau Fed'n*, 792 F.3d at 289.
[28] *Id.*
[29] *Id.*
[30] A nonpoint source is pollution that comes from many diffuse sources that are not point sources as defined by the Clean Water Act. *What is a Nonpoint Source?*, Polluted Runoff: Nonpoint Source Pollution (last visited Nov. 14, 2017), https://www.epa.gov/nps/what-nonpoint-source.
[31] *American Farm Bureau Fed'n*, 792 F.3d at 289.
[32] *Id.*

daily loads"[33] for waterways which cannot reach water quality standards by regulating point sources only.[34]

The EPA has interpreted "total maximum daily load" to "require publication of a comprehensive framework for pollution reduction in a given body of water,"[35] to decrease pollution "to restore and maintain the chemical, physical, and biological integrity" of the Chesapeake Bay.[36] The process for establishing TMDLs was slow; the States were slow to react, but they had to wait for the EPA to identify which pollutants were subject to TMDL regulation.[37] The EPA finally identified those pollutants in 1978 and required states to submit their TMDLs by June 1979.[38] The regulations defined TMDL as "the sum of waste load allocations and load allocations."[39] Once the EPA specified what the TMDLs consisted of, the states slowly incorporated them.[40] Subsequently, citizen-suits were filed, leading to the consensus that "a state's failure to submit a TMDL should be deemed a 'constructive submission' that no TMDL is needed" and triggers the EPA's duty to implement TMDLs.[41] After lawsuits in the 1990s, the states drafted thousands of TMDLs.[42] Once the states set TMDLs, the EPA approved or denied them.[43] Because primary responsibility for pollution controls is in the hands of the state, water quality standards were established first.[44] To establish a water quality standard, a state designated uses for each waterway and set a target quality based on that use, which the EPA

[33] TMDLs set the maximum amount of pollution a water body can absorb before violating applicable water quality standard. They are implemented only where it is impossible to meet water quality standards by regulation and reducing pollution from only point sources. *Id.* at 299.
[34] *Id.* at 288.
[35] *Id.*
[36] *Id.* at 287.
[37] *Id.* at 290.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 291.
[43] *Id.* at 289.
[44] *Id.*

could approve or disapprove.[45] If the EPA disapproved, it would have to promulgate its own quality standards for the waterway.[46] Once the states decided on water quality standards, the states implemented TMDLs.[47] If the EPA disapproved of any TMDLs, the EPA would promulgate TMDLs for the affected waterway.[48] After the standards and TMDLs were in effect, the EPA and state shared responsibility for enforcing them.[49]

The states in the Chesapeake Bay watershed agreed not to submit TMDLs to let the EPA establish them.[50] In 2000, the EPA entered into the Chesapeake Bay 2000 Agreement, where the EPA and political backers from the states located within the Chesapeake Bay watershed committed to reducing pollution in the Chesapeake Bay.[51] The Phase I Watershed Improvement Plans (Phase I Plan) proposed target pollution limits and proposed how the states would reach those limits.[52] The EPA developed the TMDLs for the Chesapeake Bay after the states had given assurances to meet targets in the Phase I Plan.[53] The final draft of the Phase I Plan provided reasonable assurances except for urban storm water in Pennsylvania and agricultural pollution in West Virginia.[54] The EPA imposed backstop provisions, requiring greater point source reductions for Pennsylvania and West Virginia if they could not meet their anticipated load allocations.[55] It also imposed backstop requirements for New York, which in its proposal, planned to discharge too much nitrogen and phosphorous.[56]

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 291.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 292.
[55] *Id.*
[56] *Id.*

In 2010, the EPA published the TMDLs for the Chesapeake Bay for nitrogen, phosphorous, and sediment.[57] The final TMDLs included limits for both point and nonpoint sources for nitrogen, phosphorous, and sediment.[58] The target dates anticipated that 60% of the proposed actions would be completed by 2017 and that all of the proposed actions would be in place by the year 2025.[59] After the TMDLs were established, each state had to develop a Phase II, Watershed Improvement Plan (Phase II Plan) to implement the EPA's TMDLs.[60]

C. *Challenges to EPA Action*

Environmental groups have often challenged the EPA for moving too slowly, while trade associations and commercial interests have challenged the EPA for doing anything at all.[61] In January 2011, the American Farm Bureau Federation, the Pennsylvania Farm Bureau, the Fertilizer Institute, National Chicken Council, the United States Poultry & Egg Association, the National Pork Producers Council, the National Corn Growers Association, the National Turkey Federation, and the National Association of Home Builders challenged the TMDLs adopted by the EPA. These groups specifically challenged the EPA's authority to impose limits on point and nonpoint sources, target dates, and to get assurances from watershed states that they would meet the TMDLs.[62] The American Farm Bureau Federation argued that TMDLs are supposed to be a single number, so the EPA could not include target dates, limits on point and nonpoint sources, or assurances.[63] The defendants were the United States, EPA, the Chesapeake Bay Foundation Inc., Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County Public Service District, the Midshore Riverkeeper Conservancy, the National Wildlife Federation, the Virginia

[57] *Id.* at 287.
[58] *Id.* at 292.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

Association of Municipal Wastewater Agencies, Inc., the Maryland Association of Municipal Wastewater Agencies, the National Association of Clean Water Agencies, the Pennsylvania Municipal Authorities Association, and the City of Annapolis in Maryland.[64] The District Court granted summary judgement in favor of the EPA, and this appeal followed.[65] The Third Circuit agreed with the District Court and affirmed the ruling.[66]

D. *Jurisdiction, Standing, and Ripeness*

The Third Circuit Court found that it had jurisdiction under 28 U.S.C. § 1291 and could review the case de novo.[67] A litigant needs to have standing to sue. Standing is a "concrete and particularized injury that is fairly traceable to the defendant and that it is likely that a favorable decision will redress that injury."[68] The American Farm Bureau Federation claimed its injuries consisted of incurring compliance costs when TMDLs were final.[69] The claim is that even though the TMDLs will not create an injury, they will create requirements that will create economic injury by imposing more stringent pollution limits.[70] After looking to prior Supreme Court cases, the Third Circuit Court noted that the American Farm Bureau Federation's "injuries" were speculative but were sufficient for standing.[71] The Third Circuit Court found the elements of traceability and redressability were met in this case because the EPA promoted the TMDL and eliminating those that the American Farm Bureau Federation disagreed with would

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[64] *Id.*
[65] *Id.*
[66] *Id.* at 287.
[67] *Id.* at 293 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).
[68] *Id.*
[69] *Id.* at 293.
[70] *See Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3rd Cir. 2005) (holding that economic injury is one of the paradigmatic forms of an injury in fact); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (holding regulated entities have standing to sue before the challenged regulation takes effect).
[71] *American Farm Bureau Fed'n*, 792 F.3d at 293; *See Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

significantly alleviate its regulatory responsibility.[72] Pre-enforcement challenges are ripe for suit where the issues presented are sufficient for judicial review and where there would be hardship to the parties if the suit was not heard.[73] The parties argued about the EPA's process in promulgating a TMDL and over whether postponing the case until after enforcement would impose hardships on the EPA and the states, due to wasted time, energy, and money.[74]

This case primarily concerned "total maximum daily load."[75] The CWA requires states to "establish 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."[76] The CWA also requires that those loads are set at levels 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."[77] The American Farm Bureau Federation interpreted the words "total maximum daily load," unambiguously and as a single number representing the amount of a pollutant that can be discharged into a segment of a waterway.[78] Under their interpretation, the American Farm Bureau Federation argued that the EPA overstepped its authority when it included allocated pollution amounts for different sources and target dates in the TMDL and by obtaining reasonable assurances for pollution levels for nitrogen, phosphorous, and sediment.[79]

E. *The Chevron Two Step*

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[72] *American Farm Bureau Fed'n*, 792 F.3d at 293.
[73] *Id.*; *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).
[74] *American Farm Bureau Fed'n, 792 F.3d at 293.*
[75] *Id.* at 290.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 294.
[79] *Id.*

The parties stipulated that *Chevron*, 467 U.S. 837 was the leading case on this issue.[80] *Chevron* was decided on the basis that Congress sometimes uses ambiguous language to delegate the scope of authority and allow gap filling for an administrative agency.[81] *Chevron* deference is appropriate where Congress has delegated authority to an agency to make rules.[82] The agency must be exercising that delegated authority when it made the rule in question.[83] It is also appropriate where the agency is given authority to deal with a complex statutory scheme that is technically or scientifically sophisticated.[84] Step one of the *Chevron* test is to ask whether Congress has directly addressed the issue in dispute.[85] If Congress has specifically addressed this issue, the court and the agency must give effect to Congress' intent.[86] The Court will then inquire whether the statute expressly forbids the agency's interpretation of the statute.[87] Courts reach step two if the statute is deemed ambiguous or silent as to Congressional intent.[88] At this stage, the agency's interpretation is "given controlling weight unless" it is arbitrary, capricious, or manifestly contrary to the statute.[89]

F. *Chevron Step One*

The court first addressed whether a TMDL could include more than just the quantity of pollutant, but no on-point case law existed.[90] The District Court remarked that circuit and district courts have previously defined TMDLs to conform to the EPA's regulation, and courts

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 296.
[85] *Id.* at 295.
[86] *Id.*
[87] *Id.* at 294.
[88] *Id.*; *Chevron v. NRDC*, 467 U.S. 837, 844 (1984).
[89] *Id.*; *Chevron v. NRDC*, 467 U.S. 837, 844 (1984).
[90] *American Farm Bureau Fed'n*, 792 F.3d at 295.

previously recognized the EPA's authority to fill gaps in the CWA for TMDLs.[91] In addition, numerous courts found that the phrase "total maximum daily load" was ambiguous but did not address issues with the EPA's interpretation of TMDLs.[92]

The American Farm Bureau Federation argued that the EPA's authority in setting the TMDL was just to set the amount of pollutant allowed to be discharged.[93] It argued that allocations among sources, deadlines for implementation, and assurances by the states were not allowed in any event.[94] The court noted that this interpretation would be appealing, but alternative readings were possible, especially where the reading makes the word "total" redundant and "maximum daily load" would mean the same thing as "total maximum daily load."[95] The court stated that "total" was the sum of the parts of the load, which was set at a necessary level to fight pollution.[96] The court relied on the use of the word "total" as it was used in other parts of the CWA, which indicated that Congress used "total" to mean more than just a solitary number.[97]

Congress made it mandatory that the EPA set TMDLs but did not prescribe the process the EPA was to use.[98] Because of this, the EPA chose to lay out how and why it chose those specific limits, how it thought they would be able to achieve those numbers, why those numbers were necessary to achieve the water quality standards, when it thought the standards would be met using these TMDLs, and what consequences there would be if the standards were not met.[99] The EPA used "notice and comment rulemaking," so the court noted that the APA probably

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[91] *Id.* at 296; *See NRDC v. Muszynski*, 268 F.3d 91 (2nd Cir. 2001).
[92] *American Farm Bureau Fed'n*, 792 F.3d at 297.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 298.
[97] *Id.*; 33 U.S.C. § 1284 (b)(1); 33 U.S.C. § 1284 (b)(4); 33 U.S.C. § 2238 (d)(1)(C)(i).
[98] *American Farm Bureau Fed'n*, 792 F.3d at 298.
[99] *Id.*

required the EPA to provide enough information for the public to adequately comment on the proposed regulation.[100] Publishing a single number would violate the APA because the public would be unable to comment without knowing how the EPA reached that number.[101]

Judge Ambro noted that the EPA met the CWA's requirements that the loads be established with seasonal differences and a margin of safety, taking any lack of knowledge into account.[102] The American Farm Bureau Federation wanted the EPA's reasoning for choosing specific limits to remain absent from the final regulations but the court noted that it would be odd to require the EPA to consider certain factors and then require those factors to be absent from the final report.[103] The court concluded that the CWA's requirements suggest that "total maximum daily loads" were meant to be elaborated by agency regulation, but they should certainly be more than just a single number.[104] Because Congress' use of "total maximum daily load" was ambiguous, "total" could have several meanings.[105] The CWA included requirements to have TMDLs but was silent on how to implement them, so the court concluded that Congress intended to allow the EPA to fill the gaps through the rulemaking process.[106]

G. *The Clean Water Act's Purpose*

Next, the court evaluated the purpose of the CWA.[107] It considered that the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[108] The purpose of TMDLs is to consider nonpoint source pollution.[109] The court

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[100] *Id.*; *Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007).
[101] *American Farm Bureau Fed'n*, 792 F.3d at 298.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 299; 33 U.S.C. 1251 (a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

interpreted this goal to mean that "total maximum daily load" was "broad enough to include allocations, target dates, and reasonable assurances."[110]

The CWA assigned regulation of point sources to the EPA and regulation of nonpoint sources to the states.[111] The EPA set point source pollution limits by using the permitting process under the National Pollutant Discharge Elimination System, known as NPDES permits.[112] The CWA requires the EPA to account for nonpoint sources in their NPDES permit calculations.[113] TMDLs are essential to the CWA because they tie point and nonpoint sources together to address the health of the entire body of water.[114] The court determined that the EPA's apportionment of the pollution load between point and nonpoint sources was the common sense first step to reaching a water quality standard.[115] TMDLs only apply to impaired waterways when regulating point sources is not enough to meet water quality standards.[116] When this is the case, it is essential to account for pollution from point and nonpoint sources.[117] The court rationalized that because of this and congressional silence on how to promulgate TMDLs, the EPA was authorized to establish load and waste load allocations.[118] The statute did not command the EPA to do this, but it allowed it.[119]

A timeline complemented the CWA, so the court concluded that the EPA's deadlines were common sense.[120] It was reasonable to have target dates so that the regulating body could

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[109] *American Farm Bureau Fed'n*, 792 F.3d at 301.
[110] *Id.* at 299.
[111] *Id.*
[112] *Id.*; 33 U.S.C § 1342.
[113] *American Farm Bureau Fed'n*, 792 F.3d at 299.
[114] *Id.*
[115] *Id.*; Michael M. Wenig, *How "Total" are "Total Maximum Daily Loads"?- Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act,* 12 Tul. Envtl. L.J. 87, 150 (1998).
[116] *American Farm Bureau Fed'n*, 792 F.3d at 300.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*

determine the daily amounts of pollution allowed.[121] For example, the amount of each pollutant allowed could be higher if the date expected to meet the quality standard was 100 years from now, more than if the expected date was 5 years from now.[122] Any proposal to improve water quality would need to address that waterways change over time; therefore, a timeline and target dates were necessary to execute water quality standards.[123] The court decided that including target deadlines was consistent with the CWA's purpose.[124]

TMDLs must be set to meet water quality standards.[125] The court held that permitting the EPA to seek assurances from the states was consistent with the CWA.[126] The EPA chose to set TMDL levels with state input but decided for itself whether those levels would really meet water quality standards.[127] Therefore, the EPA utilized reasoned judgment and was consistent with the requirements of the CWA.[128]

H. *The Canons of Constitutional Avoidance and Federalism*

The American Farm Bureau Federation also argued that the Chesapeake Bay TMDL intruded on land use, an area traditionally regulated by the states, so the federal government should not intrude on state powers.[129] The court used two canons of statutory construction – constitutional avoidance[130] and the related "federalism canon."[131] The Third Circuit Court stated that the canons should be used during the analysis of step one of the *Chevron* test.[132] The

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*; 33 U.S.C. § 1313(d)(1)(C).
[126] *American Farm Bureau Fed'n*, 792 F.3d at 300.
[127] *Id.*
[128] *Id.*; *Ctr. For Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014).
[129] *American Farm Bureau Fed'n*, 792 F.3d at 301.
[130] Constitutional Avoidance is the principal that courts should avoid ruling on constitutional issues and, if possible, resolve cases on other grounds. *Constitutional Avoidance*, Cornell Law School (last visited Nov. 14, 2017), https://www.law.cornell.edu/wex/constitutional_avoidance.
[131] *American Farm Bureau Fed'n*, 792 F.3d at 301.
[132] *Id.*

question here was not whether the Chesapeake Bay was under federal jurisdiction, but rather, what was a "total maximum daily load?"[133] The court concluded that, even if the EPA's action encroached more on state rights, the term "total maximum daily load" was within the "cooperative federalism framework" and the Chesapeake Bay was within the agency's jurisdiction.[134] The Third Circuit stated that requiring a clear statement of congressional intent for every vague word or phrase used in highly technical statutes would defeat *Chevron*, the purpose of which was to allow Congress to leave the details to experts.[135] The Third Circuit Court declined to find that defining allocated loads was a power reserved for the states, even where the TMDLs affected land use.[136] The court pointed out that the TMDL in question had not actually made land use decisions that reduced state power in any substantial way.[137] The court stated that land use provisions in the TMDL were explicitly allowed by federal law or were too general to displace state zoning powers.[138]

Undermining the American Farm Bureau Federation's claim was that the TMDL did not decide a specific method of reduction to any one specific source; the TMDLs just listed pollution limits and allocations used in connection with state efforts to reduce pollution.[139] It also had watershed improvement plans implemented by the states, and the EPA repeated that it would not make enforcement actions under the TMDL.[140] The American Farm Bureau Federation argued it was more than just an informational device because if the state did not adopt a planning process,

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[133] *Id.* at 302.
[134] *Id.*
[135] *Id.*; *City of Arlington v. FCC*, 569 U.S. 290 (2013).
[136] *American Farm Bureau Fed'n*, 792 F.3d at 302.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 303.
[140] *Id.*; Tr. Of Oral Argument at 91.3 Oct. 4 2012, *American Farm Bureau Fed'n v. EPA*, No. 11-cv-67 (M.D. Pa.), J.A. 1758; EPA Response Br. At 23.

the state could lose its authority to administer NPDES permits.[141] Another way the EPA could motivate states to act in harmony with TMDLs could be to place more regulations on states if progress was insufficient, and their access to federal grants could be affected if progress did not meet the water quality standards and deadlines.[142]

However, the American Farm Bureau Federation never argued that the possible punishment for not enforcing the EPA's TMDL was "so coercive as to pass the point at which pressure turns into compulsion."[143] The Third Circuit did not find this to be a valid argument anyway and concluded that the TMDL did not excessively intrude on state authority over land use rules.[144] The court reasoned that it was illogical to say the EPA is intruding on state authority when it does not make actual, identifiable, land use rules and did not propose any regulatory actions not allowed under federal law.[145] "When a statutory scheme clearly inserts the federal government into an area of typical state authority, [the court] may require a plain statement from Congress about the scope of the statute's applicability before upholding an agency's assertion of jurisdiction" over a traditionally state regulated area.[146] There were no fears here that were of such a magnitude that the court would require a clear intent statement from Congress because there was a mandate of federal oversight.[147]

I. *The Commerce Clause*

The next issue addressed by the court was whether the EPA's reading of "total maximum daily load" pushed at the "constitution's outer bounds."[148] The federal government has regulated disputes over interstate water pollution for more than 100 years under the interstate commerce

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[141] *American Farm Bureau Fed'n*, 792 F.3d at 303.
[142] *Id.*
[143] *Id.* at 304 (citing South Dakota v. Dole, 483 U.S. 203, 211 (1987)).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*

power.[149] Regulating the channels of interstate commerce is at the core of the commerce power.[150] The Chesapeake Bay is a channel of interstate commerce; every year, it produces millions of pounds of seafood and is a major shipping route to the Baltimore Port.[151] The estimated economic value is more than one trillion dollars.[152] The court concluded that the federal government clearly had authority to regulate the Chesapeake Bay, noting that unlike many previous cases, this is not regulation of a minor intrastate area; this is the largest estuary in North America.[153] Navigable waters are able to be regulated, and the Chesapeake Bay is navigable.[154] The court concluded that the TMDL issued here by the EPA was a plan to clean up a channel of interstate commerce, so there was no constitutional issue with the EPA's interpretation.[155]

J. *Chevron Step Two*

The court observed that since the American Farm Bureau Federation just repeated its *Chevron* step one argument, there was no need to "dive too deep" into the second part of *Chevron*.[156] The court may consider legislative history to illuminate statutory policies to decide if an agency made a reasonable policy choice in interpreting the statute.[157] A pre-enactment committee report by the House Public Works Committee commented that a maximum daily load should be created by states for waterways "which are not identified as requiring more stringent effluent limitations to meet water quality standards."[158] The court observed that the report

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[149] *Id.*; *Missouri v. Illinois*, 200 U.S. 496 (1906).
[150] *American Farm Bureau Fed'n*, 792 F.3d at 304; *United States v. Lopez*, 514 U.S. 549 (1995); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).
[151] *American Farm Bureau Fed'n*, 792 F.3d at 305.
[152] *Id.*; EPA Response Br. At 4.
[153] *American Farm Bureau Fed'n*, 792 F.3d at 305-306.
[154] *Id.* at 306.
[155] *Id.*
[156] *Id.* at 307.
[157] *Id.*
[158] *Id.* at 308.

indicated establishing TMDLs is a time consuming and difficult process, and the report was of no help establishing anything else.[159]

After the CWA was enacted, the EPA defined "total maximum daily load" in 1987 as "the sum of waste load allocations for point sources and load allocations for nonpoint sources.[160] Congress then passed 33 U.S.C. 1313 (d)(4)(A) and (B), which govern revisions of effluent limits based on TMDLs or other waste load allocations.[161] The court noted that using the term "other" suggested that TMDLs included waste allocations, despite not mentioning "waste load allocations."[162] That phrase only occurs in EPA regulations.[163] The court agreed that the EPA had a strong case that Congress approved of its definition and incorporated that rule by adding its language to the statute.[164]

Congress also ratified the Chesapeake Bay Program[165] in 1987, which supported cleaning the Chesapeake Bay, using grants and studies.[166] In 2000, Congress amended the CWA to add 33 U.S.C. 1267(g), which directed the EPA to ensure plans were developed and to make sure implementation had started to meet the objectives of the Chesapeake Bay Program.[167] This did not add to the EPA's authority, but it showed congressional intent that cleaning the Chesapeake Bay was a priority.[168]

The American Farm Bureau Federation posited that Congress rejected the EPA's authority by blocking a rule that also included a reasonable assurance requirement, but the EPA correctly pointed out that the rule was blocked for one year only, so there was no reason to think

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[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] This is a voluntary partnership among several watershed states and the EPA. *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*

Congress blocked it specifically because of reasonable assurances.[169] They also argued that the Chesapeake Bay would be cleaned with no EPA regulation, but the court concluded that the argument defied common sense and experience.[170] The court noted that by 2010, 62% of the Chesapeake Bay had insufficient oxygen to support aquatic life and only 18% had acceptable water clarity, so there was no rational claim that the Chesapeake Bay would be cleaned without EPA intervention.[171] The court ultimately concluded that the EPA made a reasonable policy choice under step two of the *Chevron* analysis.[172] The court upheld the EPA's TMDLs under step two because a comprehensive TMDL, with allocations, deadlines, and reasonable assurances, was reasonable and was a legitimate policy choice by the EPA where the CWA was ambiguous.[173]

The Third Circuit affirmed the opinion of the District Court, noting that the winners were "environmental groups, the states that border the Bay, tourists, fishermen, municipal waste water treatment works, and urban centers" and the losers were "rural counties with farming operations, nonpoint source polluters, the agricultural industry, and those states that would prefer a lighter touch from the EPA.[174]

History

A. *The Clean Water Act*

While the CWA is generally viewed as a success, there have been major problems with its regulation of nonpoint sources.[175] "Nonpoint source pollution is the primary reason the

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[169] *Id.*
[170] *Id.*
[171] *Id.* at 309.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 310.
[175] Sarah Brull, *An Evaluation of Nonpoint Source Pollution Regulation in the Chesapeake Bay*, 13 U. Balt. J. Envtl. L. 221 (2006).

Chesapeake Bay is perpetually present on the EPA's "impaired water list."[176] In 1948, the first major U.S. law addressing water pollution, the Federal Water Pollution Control Act, was passed.[177] When it was amended in 1972, it became known as the CWA.[178] These amendments established the structure for regulating the discharge of pollutants into the waters of the United States.[179] It also gave the EPA the authority to implement programs to control water pollution and maintain requirements for water quality standards and made it unlawful to discharge pollutants without a permit.[180] It was modified again in 1981 and 1987, and there have been other laws subsequently passed that have changed portions of the CWA.[181] The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[182] Some of the objectives included eliminating the discharge of pollutants into navigable waters by 1985, attaining a higher water quality that protects wildlife and provides for a safer environment to engage in recreational activities in the water by 1983, prohibiting the discharge of pollutants in toxic amounts, and providing financial assistance to build public waste treatment facilities.[183] Section 1313(d) of the CWA requires states to identify waters where current pollution control cannot meet water quality standards. These bodies of waters are referred to as "impaired waters."[184] These bodies of water are prioritized based on severity and designated uses.[185] States must establish the TMDLs of pollutants permitted to be discharged in

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[176] *Id.* at 222.
[177] *History of the Clean Water Act*, Laws & Regulations (last updated Aug. 8, 2017), https://www.epa.gov/laws-regulations/history-clean-water-act.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] 33 U.S.C. § 1251 (1977).
[183] *Id.*
[184] 13 U.S.C. § 1313 (d) (1977); *Impaired Waters and TMDLs: Statute and Regulations*, Impaired Waters and TMDLs (last visited Nov. 14, 2017), https://www.epa.gov/tmdl/impaired-waters-and-tmdls-statute-and-regulations.
[185] *Impaired Waters and TMDLs: Statute and Regulations*, Impaired Waters and TMDLs (last visited Nov. 14, 2017), https://www.epa.gov/tmdl/impaired-waters-and-tmdls-statute-and-regulations.

impaired waters.[186] The Chesapeake Bay has been designated as an "impaired water," but its watershed extends over 64,000 miles into DC, Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia.[187]

B. *The Chesapeake Bay and the Chesapeake Bay Agreement*

In 1983, due to major, increasing pollution in the Chesapeake Bay, the EPA entered into an agreement with DC, Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia that recognized the need to decrease pollution in the Chesapeake Bay.[188] In 1987, the EPA signed another agreement requiring a 40% reduction in nutrient pollution in the Chesapeake Bay by 2000.[189] In 2000, after the EPA and the states realized that they could not meet their 1987 goal, the Chesapeake Agreement of 2000 was signed. This agreement promised to get the Chesapeake Bay off the CWA's "dirty water list" by 2010.[190] In September of 2010, DC, Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia submitted their Phase I Watershed Implementation Plans (Phase I) to the EPA.[191] In December 2010, the designated states published their Phase I plans and the EPA developed a TMDL for the Chesapeake Bay.[192] In December of 2011, the states submitted their Phase II Watershed Implementation Plans (Phase II).[193] In 2012, the EPA released research and data estimating that approximately 74% of the Chesapeake Bay was partially or fully impaired by toxic

[186] 13 U.S.C. § 1313 (d) (1977); *Impaired Waters and TMDLs: Statute and Regulations*, Impaired Waters and TMDLs (last visited Nov. 14, 2017), https://www.epa.gov/tmdl/impaired-waters-and-tmdls-statute-and-regulations.
[187] *Watershed*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/discover/watershed.
[188] *The History of Chesapeake Bay Cleanup Efforts*, Chesapeake Bay Foundation (last visited Nov. 14, 2017), http://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/the-history-of-bay-cleanup-efforts.html.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*

contaminants.[194] The most troublesome toxic contaminants were polychlorinated biphenyls (PCBs),[195] mercury,[196] polycyclic aromatic hydrocarbons,[197] and a few herbicides.[198] Dioxins, petroleum hydrocarbons, chlorinated insecticides, and various metals were also present in some areas of the Bay.[199]

Other problematic pollutants in the Bay were nitrogen and phosphorus, both of which are nutrients.[200] A small amount of nutrients are okay, but excess nutrients in a water source leads to the growth of algae blooms, which leave zones in the waterway with such a low oxygen content that they are considered dead zones because they cannot support aquatic life.[201] Sediments in excessive amounts, including sand, silt, and clay, can cloud the water and harm wildlife.[202]

Agricultural pollution is the largest source of nutrient and sediment pollution in the Chesapeake Bay.[203] Agricultural pollution is the byproduct of various farming practices including waste from all types of farming activities, which includes run-off of chemicals, manure, and dust and other residues from erosion.[204] Agriculture contributes 42% of nitrogen,

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[194] *Toxic Contaminants Policy and Prevention*, Chesapeake Progress, (last visited Nov. 14, 2017), http://www.chesapeakeprogress.com/clean-water/toxic-contaminants-policy-and-prevention.
[195] PCBs are found in old electrical equipment, paint, and plastics and leak into the environment despite being banned in the 1970s. *Pollution*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeake bay.net/state/pollution.
[196] Mercury is released through burning coal, oil, and wood, and from burning mercury-containing waste. *Pollution*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/state/pollution.
[197] Polycyclic aromatic hydrocarbons come from burning gas, coal, and oil and herbicides. *Pollution*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/state/pollution.
[198] *Toxic Contaminants Policy and Prevention*, Chesapeake Progress, (last visited Nov. 14, 2017), http://www.chesapeakeprogress.com/clean-water/toxic-contaminants-policy-and-prevention.
[199] *Id.*
[200] *Pollution*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/state/ pollution.
[201] *Id.*
[202] *Id.*
[203] *Agriculture*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/issues/ agriculture.
[204] *Agricultural Pollution*, Glossary of Statistical Terms, (last visited Nov. 14, 2017), https://stats.oecd.org /glossary/detail.asp?ID=2971.

55% of phosphorus, and 60% of sediment in the Chesapeake Bay.[205] Irrigation, tillage, and fertilizer use are the three main causes of the increasing pollution of the Chesapeake Bay.[206] Irrigation promotes erosion and pushes pollutants into waterways.[207] These waterways carry sediments, fertilizers, pesticides, and nutrients from animal waste into the Chesapeake Bay.[208] Another farming practice called "tilling" loosens the soil and makes it easier to be eroded into waterways.[209] Farmers use manure and a wide array of chemicals in order to improve their crops each year.[210] These provide many benefits for the farmer, including killing pest animals, insects, and weeds.[211] In addition, there are other environmental factors that affect the Chesapeake Bay negatively, including deforestation; invasive species; the overharvesting of fish, crabs, and oysters; climate change; and the overpopulation of humans on the Bay's shores.[212]

C. *Clean Up Efforts in the Chesapeake Bay*

Cleanup efforts in the early 2000s were insufficient to make the progress necessary to reach water quality standards, so, the EPA, acting under the CWA, implemented TMDLs for nitrogen, phosphorus, and sediment.[213] TMDLs calculate maximum amounts of pollutants that a waterway can accept while still meeting water quality standards.[214] Also, TMDLs allocate portions of the overall pollution amount allowed to be attributed from various sources.[215] There

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[205] *Agriculture*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/issues/agriculture.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Learn the Issues*, Chesapeake Bay Program, (last visited Nov. 14, 2017), https://www.chesapeakebay.net/issues.
[213] *Chesapeake Bay TMDL Fact Sheet*, Chesapeake Bay TMDL, (last visited Nov. 14, 2017), https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-fact-sheet.
[214] *Total Maximum Daily Loads: A Citizen's Guide to the Chesapeake Bay TMDL*, EcoCheck, (published April 2011), http://files.dep.state.pa.us/Water/ChesapeakeBayOffice/WIPIII/(1)%20Total%20Maximum%20Daily%20Loads%20-%20A%20citizen%27s%20guide %20to%20the%20Chesapeake%20Bay%20TMDL.pdf.
[215] *Id.*

are currently more than 40,000 TMDLs in the country.[216] "Once states were establishing TMDLs somewhat regularly, litigation moved on to the substance and effect of TMDLs, such as whether they were enforceable, whether they could be written for waters impaired only by nonpoint sources, and whether allocations had to be set in "daily" terms."[217]

D. *American Farm Bureau Federation v. United States EPA*

In *American Farm Bureau Federation*, the Third Circuit Court relied on several cases, most importantly *Massachusetts v. EPA*, 549 U.S. 497 (2007), *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159 (2001), *Rapanos v. United States*, 547 U.S. 715 (2006), and *Chevron*, 467 U.S. 837. The Third Circuit Court relied on *Massachusetts*, 549 U.S. 497 for standing.[218] The Supreme Court, in a case arising under the Clean Air Act, stated that the question of standing is whether the plaintiffs have such a personal stake in the outcome of the case that it assures adverseness to sharpen the presentation of issues.[219] In *Massachusetts*, private organizations filed a rulemaking petition asking the EPA to regulate emissions of carbon dioxide, which would require the EPA to regulate emissions from new motor vehicles which caused or contributed to air pollution reasonably anticipated to endanger public health or welfare.[220] To show standing, the plaintiffs had to show injury in a "concrete and personal way."[221] The injury needed to be actual or imminent and fairly traceable to the defendant.[222] Massachusetts showed that because sea levels were rising, there was a

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[216] *Id.*
[217] Kelly Gable, *The Third Circuit Interprets "Total" Maximum Daily Loads*, 47 Trends: ABA Section of Environment, Energy, and Resources Newsletter, https://www.americanbar.org/publications/trends/2015-2016/november-december-2015/the_third_circuit_interprets_total_maximum_daily_loads.html.
[218] *American Farm Bureau Federation v. EPA*, 792 F.3d 281, 293 (3rd Cir. 2015).
[219] *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).
[220] *Id.* at 510.
[221] *Id.* at 517.
[222] *Id.*

concrete injury due to loss of the land on the coast[223] and due to emissions that the EPA was refusing to regulate.[224] It must also be likely that a favorable decision will redress the injury.[225] The court concluded that the redressability requirement is met when the plaintiff shows that a favorable decision will relieve a single discrete injury, not every injury.[226] Massachusetts' injury would probably not have been completely remedied, but a reduction in emissions would slow the injury caused by global warming.[227] The court determined that the petitioners, including Massachusetts, had standing to bring the lawsuit.[228] The Third Circuit Court had noted prior to *Massachusetts* being decided, the court in *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (2005) found that while there is no simple formula to determining injury, economic injury has always been recognized as an injury in fact.[229]

Next, the Third Circuit Court relied on *Abbott Labs*, 387 U.S. 136, for ripeness.[230] The petitioners in *Abbott Labs* appealed the judgment because their complaint had been dismissed for lack of ripeness.[231] There was no case or controversy at the time of the case and therefore, no relief would be available.[232] The Supreme Court held that the controversy was ripe for adjudication when the presented legal issues were fit for judicial resolution.[233] Because the amended Federal Food, Drug, and Cosmetic Act in *Abbott Labs* imposed a change in conduct, requiring prescription manufacturers to print the established name of a drug in font that was at

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[223] *Id.* at 522.
[224] *Id.* at 523.
[225] *Id. at 517.*
[226] *Id.* at 525.
[227] *Id.* at 526.
[228] *Id.* at 506.
[229] *American Farm Bureau Fed'n*, 792 F.3d at 293.
[230] *Id.* at 294.
[231] *Abbott Labs v. Gardner*, 387 U.S. 136, 139 (1967).
[232] *Id.*
[233] *Id.* at 149.

least half as large as the proprietary name, as designated by the Secretary of Health, Education, and Welfare, with serious penalties for noncompliance, the suit was ripe.[234]

The Third Circuit distinguished *American Farm Bureau Federation* from *Solid Waste Agency*, 531 U.S. 159 (*SWANCC*) and *Rapanos*, 547 U.S. 715 for the avoidance canon of federalism.[235] In *SWANCC*, the Army Corp of Engineers attempted to require CWA Section 404 permits for filling in intrastate waters under the CWA and attempted to permit regulation of intrastate, isolated waters that were migratory bird habitats, under the Corps' Migratory Bird Rule.[236] The Supreme Court held that the CWA did not support the Migratory Bird Rule or authority over ponds and mudflats that fell within the Migratory Bird Rule.[237] In *Rapanos*, the issue was whether wetlands, which were essentially fields that were sometimes saturated, fell within the scope of the CWA.[238] The plurality noted that the Corps has attempted to assert jurisdiction over "virtually any parcel of land containing a channel or conduit-- whether man-made or natural, broad or narrow, permanent or ephemeral-- through which rainwater or drainage may occasionally or intermittently flow."[239] The Third Circuit noted that in both cases the Army Corp of Engineers attempted to assert authority over areas as "waters of the United States," but it was unclear as to whether the Corps actually had jurisdiction because they were not waters of the United States under the CWA.[240] The Supreme Court in both cases declined to accept that the Corps had jurisdiction over those areas which appeared to be traditionally regulated by the states.[241] The Third Circuit Court distinguished these cases from *American Farm Bureau*

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[234] *Id.* at 137-138.
[235] *American Farm Bureau Fed'n*, 792 F.3d at 301.
[236] *Solid Waste Agency v. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2000).
[237] *Id.* at 167 and 174.
[238] *Rapanos v. United States*, 547 U.S. 715, 719-720 (2006).
[239] *Id.* at 722.
[240] *American Farm Bureau Fed'n*, 792 F.3d at 301-302.
[241] *Id.* at 302.

Federation because jurisdiction was not what was at issue.[242] The Third Circuit Court noted that if the case were more like Rapanos or SWANCC in diminishing state authority over intrastate isolated land, the result might have been different.[243]

E. *Chevron, U.S.A., Inc. v. NRDC, Inc.*

Chevron, 467 U.S. 837 established the strictness of judicial review for agency decisions.[244] *Chevron* dealt with the Clean Air Act's requirements that states establish a permit program to regulate new or modified stationary sources in areas of nonattainment.[245] The EPA defined stationary source as the bubble concept, which viewed stationary sources as plant-wide and meant that an existing plant that contained several pollution-emitting devices could install or modify one section without a permit as long as it would not increase overall emissions.[246] The court of appeals held that the bubble concept was contrary to the Clean Air Act because the Clean Air Act's purpose was to remedy polluted air.[247] The court held that when it reviews an agency's construction of a statute, the court must consider two questions.[248] The first was whether Congress directly addressed the precise question at issue.[249] If it has, the court should follow the intent of Congress.[250] Where Congress has not addressed the particular issue, the court should decide whether the agency's construction is based on a permissible construction of the statute.[251] A construction is not permitted if it is "arbitrary, capricious, or manifestly contrary to the statute."[252] In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985),

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[242] *Id.*
[243] *Id.*
[244] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).
[245] *Id.* at 839.
[246] *Id.*
[247] *Id.*
[248] *Id.* at 842.
[249] *Id.* at 843.
[250] *Id.*
[251] *Id.* at 844.
[252] *Id.*

the Supreme Court decided that where Congress left gaps in the CWA, it intended the EPA to fill gaps with provisions that are not inconsistent with the expressed intent of Congress.[253] More recently, the Supreme Court upheld *Chevron*, holding that *Chevron* deference is appropriate when a statute is ambiguous and an agency is charged by Congress with administering a complex statutory scheme because Congress would have intended the agency to fill gaps.[254]

Analysis

American Farm Bureau Federation is a well thought out, well-reasoned opinion. It addressed all of the issues and consulted many of the leading environmental law cases including *Chevron*, 467 U.S. 837 and *Massachusetts*, 549 U.S. 497. Circuit Judge Ambro also applied that precedent appropriately. The court addressed the APA in its decision, by considering that reporting just one number for a TMDL would violate the APA because there would not be enough information for the public to effectively comment on the issue without the EPA's reasoning.[255] It is a great decision because it may allow the Chesapeake Bay and surrounding waters to be cleaned more effectively. When an average of 18.9% of the largest estuary in the world is still considered to be a dead zone after decades of cleanup efforts, society at large needs more regulation like this to solve problems with massive pollution.[256] Because the Supreme Court declined to hear the case on appeal, the decision is still good law and is a good first step to combatting pollution in the Chesapeake Bay.

There are many possible implications of allowing the EPA to allocate pollution amounts to nonpoint sources, to get assurances from many states, and to set target dates for implementation. One potential implication is that in other areas with large bodies of water, the

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[253] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).
[254] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).
[255] *American Farm Bureau Fed'n*, 792 F.3d at 298.
[256] Pamela Wood, *Fewer Chesapeake Bay Water Samples Show 'Dead Zone' Conditions*, The Baltimore Sun (Oct. 26, 2017), http://www.baltimoresun.com/news/maryland/environment/bs-md-bay-dead-zone-20171026-story.html.

EPA may be able to regulate nonpoint industries by allocating certain amounts to them. Farming is a large polluter in many areas.[257] While society needs farming, society also needs clean and safe areas to farm and do other activities, so farming in a way that does not destroy the Earth is essential. By allowing the TMDLs to stand, the court has taken a step towards ensuring that the environment can be cleaned up for use in future generations. Another good thing is that this decision creates legal precedent for allowing states to provide assurances that they will meet pollution goals set by the EPA. Because it was allowed for the Chesapeake Bay, it is very possible that the EPA may use the same approach for other impaired bodies of water, leading to a more effective way to clean up the environment because if the states agree to cooperate with the EPA's plan, there will be less lawsuits over enforcement brought by the states and more willingness to cooperate without a protracted legal battle. Providing assurances that are binding on the states would also give the EPA an enforcement mechanism for states that do not meet their promised pollution reductions. By setting target dates, the EPA can more effectively clean up impaired waterways because pollution reduction will be different depending on whether the target date is 100 years away or 20 years away. A shorter date will impose more reductions sooner, and by setting a target date, the EPA and states can better understand what reductions will be required of them in the short and long term.

American Farm Bureau Federation will probably play a role in how the EPA decides to regulate nonpoint sources in the future in waterways that are like the Chesapeake Bay, impaired by pollutants that cannot be controlled by ordinary NPDES permits for point sources because of nonpoint source pollution. The actions of the states and the EPA are a great example of a cooperative approach for states and the federal government to work together to solve massive

[257] NTP Staff, *Farming is a Major* Polluter, Nourish the Planet (Feb. 11, 2015), http://nourishtheplanet.com/2015/02/farming-is-a-major-polluter/.

pollution problems, so it could inspire more cooperation and fewer challenges to EPA action. The EPA is now able to include target dates, allocate amounts of pollutants to nonpoint sources overall, and request assurances from the states that border an impaired waterway, so this decision will create legal precedent in the Third Circuit and will provide persuasive authority for other circuits and lower courts to allow these measures, which will have a positive impact on the environment overall.

In the states that are affected by this TMDL, business and society will be affected because of heightened restrictions on nonpoint source pollutants. It will affect how farmers and other nonpoint sources operate. Because it requires certain nonpoint sources to reduce their pollution levels to meet the EPA's goals, practices will have to change and that can often be expensive. Agriculture is the largest polluter of the Chesapeake Bay, so small farmers could be hurt financially by the decision because of new techniques that would be required including planting cover crops to slow erosion, keeping some sediment out of the Chesapeake Bay and waterways that feed into the Chesapeake Bay, and using fewer fertilizers or using more environmentally friendly ones, keeping some nitrogen and phosphorous nutrients out of the water. Anything subject to creating a large amount of runoff will likely be regulated because of sediment pollution, and the states subject to the new TMDLs will likely enforce them because the state provided assurances that are binding.

The Third Circuit opinion failed to resolve whether the possible punishment of losing control over NPDES permitting for states who have delegated authority or possible new pollution restrictions was so coercive as to pass the point at which pressure turns to compulsion. The American Farm Bureau Federation would have had to argue that the EPA coerced the states into accepting the TMDL. The court does note that the only inducement or punishment is that if

the state does not adopt a plan, it could lose its authority to administer whatever portion of the NPDES program that has been delegated to it.[258] The EPA would impose harsher pollution control measures on a state than would otherwise be required, but all of the EPA's actions to enforce whatever program they would impose would be within the EPA's authority.[259] It seems unlikely that the inducement offered would be so far as to be coercive. There are limits on the governmental power that state that if the inducement offered by Congress is so coercive that it passes the point that pressure turns into compulsion, the action might be unconstitutional.[260] It seems very unlikely that being allowed to issue permits through the NPDES program is such a benefit that the state would have almost no choice but to accept congressional or EPA will. A few states, Connecticut, Maine, Rhode Island, Vermont, Massachusetts, New Hampshire, Idaho, and Montana, do not implement the NPDES program, so it does not seem so coercive that states do not have an alternative option.[261]

Conclusion

That 74% of the Chesapeake Bay is considered partially or fully impaired by toxic contaminants[262] should be a wakeup call that we need more approaches to combat pollution such as the one used here in cooperation between the EPA and Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and DC. The CWA was passed in an effort to help repair the damage done to waterways in the United States and it included provisions that would allow

[258] *American Farm Bureau Fed'n*, 792 F.3d at 303.
[259] *Id.*
[260] *Nevada v. Skinner*, 884 F.2d 445, 447 (9th Cir. 1989).
[261] *Who Issues NPDES Permits in New England?*, United States Environmental Protection Agency (last visited Nov. 25 2017), https://www3.epa.gov/region1/npdes/issuers.html.
[262] *Toxic Contaminants Policy and Prevention*, Chesapeake Progress, (last visited Nov. 14, 2017), http://www.chesapeakeprogress.com/clean-water/toxic-contaminants-policy-and-prevention.

the states or the EPA to establish TMDLs to clean up waterways that are impaired despite regulation of point sources.[263]

The Third Circuit Court had jurisdiction and the American Farm Bureau Federation had standing to sue the EPA because it would possibly have been injured by the new regulation. In determining the meaning of "total maximum daily load," the Third Circuit Court addressed every issue raised in the case, followed precedent, and considered several other sources of law. The court was right to uphold the TMDLs that the EPA implemented in order to clean up the Chesapeake Bay. The CWA anticipated a partnership between the federal and state governments[264] and this decision makes that goal one step closer by allowing the EPA to create TMDLs that include reasonable assurances that watershed states will meet pollution targets, include target dates for cleaning up impaired waterways, and include limits for specific sources, including nonpoint sources. The CWA also requires a TMDL to be established for waterways that are impaired and cannot be brought into attainment by only regulating point sources.[265]

Under *Chevron*, the court gave weight to the EPA's regulation because Congress had left gaps for the EPA to fill, including how to promulgate TMDLs.[266] The EPA chose notice and comment rulemaking under the APA, and the information on point and nonpoint sources would have been necessary for the public to adequately comment on the proposed TMDL.[267] The court could have declared that the TMDL was arbitrary, capricious, or manifestly contrary to the law, but it found the rule to be consistent with the CWA and prior Supreme Court cases.[268]

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[263] *American Farm Bureau Fed'n, 792 F.3d* at 288.
[264] *Id.* at 299; 33 U.S.C. 1251 (a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).
[265] *American Farm Bureau Fed'n* at 288.
[266] *Id.* at 298.
[267] *Id.* at 298.
[268] *Id.* at 294-295.

This decision could open the door for more cooperative approaches to water pollution in large bodies of water by setting the standard that would allow state assurance, target dates, and regulation of specific sources. While the case is not binding on all courts in the country, it provides legal precedent to allow the EPA to play a larger role in water pollution in areas where the watershed of a body of water extends into many states. Business may be affected in the short term by having to conform to pollution controls and lower limits for pollution, but when we have a clean environment, we all benefit long term.