

Balancing the Pollution Budget After *Friends of the Earth v. EPA*

*Jason Malinsky**

Divergent interpretations of “daily” in the context of the Clean Water Act’s “total maximum daily load” program have created a circuit split between the D.C. Circuit and the Second Circuit. In 2006, the D.C. Circuit decided in Friends of the Earth v. EPA that “daily” means “every day.” Several years earlier the Second Circuit in NRDC v. Muszynski had decided “daily” could mean “seasonally” or “annually.” The D.C. Circuit’s opinion should ultimately govern because the holding applies Chevron properly and promotes the policy goals of the Clean Water Act. The circuit split and EPA’s subsequent revision of its own interpretation of “daily” present questions about the future of this potentially far-reaching and controversial Clean Water Act regulatory program. EPA’s recent reinterpretation of “daily” craftily incorporates the Friends of the Earth ruling while maintaining the flexible regulatory structure that allows for less rigorous environmental standards. If challenged, the agency’s recent interpretation of “daily” will likely be given deference under Chevron. In light of EPA’s actions, policymakers must now consider reforming the TMDL program to better apply pollution standards equitably to major polluters, including the agriculture industry—the nation’s largest water polluter.

Introduction	862
I. The Clean Water Act TMDL Provision and the Circuit Split on “Daily”	865

Copyright © 2007 by the Regents of the University of California.

* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2008; B.A. Environmental Policy & Investigative Reporting (High Honors), University of California, Berkeley, 2003. The author wishes to thank his classmates in the Environmental Writing Seminar for their helpful suggestions in the early stages of the writing process. In particular, Corie Calfee, Bob Infelise, and Julie Thrower for their reviews of numerous drafts. Dan Farber also reviewed an early draft and provided helpful comments. Matt Sieving did tremendous work on the thankless job of bluebooking and citechecking this article. Alice Bodnar applied the finishing touches to make this piece publishable. Thanks to everyone.

A.	The Clean Water Act's TMDL Provision.....	866
B.	<i>NRDC v. Muszynski</i>	868
C.	<i>Friends of the Earth v. EPA</i>	871
1.	Background.....	871
2.	District Court Decision.....	873
3.	D.C. Circuit Decision.....	873
II.	Legal Implications.....	876
A.	Judicial Review of Agency Statutory Interpretation Under <i>Chevron</i>	876
B.	The Court's Use of Canons of Statutory Interpretation in Step 1 of the <i>Chevron</i> Analysis.....	878
1.	The Misuse and Limits of the Absurdity Doctrine.....	879
C.	Why the D.C. Circuit Holding is Correct	882
III.	Policy Implications for a Non-"Every Day" Interpretation of "Daily"	883
A.	Is "Every Day" Regulation the Best Thing for the Environment?	884
B.	Establishing Equity in Water Pollution Regulation after <i>Friends of the Earth</i>	889
IV.	Aftermath of <i>Friends of the Earth</i>	891
A.	EPA's New TMDL Interpretation—What is it AND Is it Good for the Environment?.....	892
B.	Will EPA's New Interpretation of "Daily" Survive Judicial Review?	893
	Conclusion.....	894

INTRODUCTION

Chances are, if you stopped the proverbial man on the street and asked him the meaning of "daily" he would probably look at you a little funny for asking such a silly question and then tell you that "daily" means "every day." Surprisingly, two Federal Courts of Appeals presented with this question in the context of the Clean Water Act (CWA) could not agree on the answer. The D.C. Circuit Court agreed with the man on the street.¹ The Second Circuit disagreed, finding instead that "daily" could mean "seasonally" or "annually."²

This circuit split raises an important question about statutory interpretation and provides an opportunity for a broader debate about the regulation of water pollution through the CWA's Total Maximum Daily Load (TMDL) program. Should plain meaning guide a court's legislative interpretation, or does this task instead require complex legal

1. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006).

2. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001).

rules to guide decisionmaking? The implications of this choice stand to have huge impact on the ability of the controversial TMDL program to regulate the nation's most polluted waterways.

The CWA requires states to list their most polluted water bodies (there are more than 34,000 polluted water bodies nationwide)³ and then set an individual pollution budget for each river, lake, or ocean.⁴ The budget must ensure a low enough threshold of pollution to protect the water body for its purpose as a water supply, for species protection, recreation, or other set goal. Key to this pollution budgeting are "total maximum daily loads" (TMDLs). TMDLs set the amount of pollution these "impaired"⁵ water bodies can tolerate and still comply with the CWA.

The conflicting decisions by the Second and D.C. Circuit Courts of Appeals over the meaning of "daily" in the context of "total maximum daily load" causes confusion among regulators, industry, and municipalities who must enforce or abide by these pollution standards. Several years ago, in *Natural Resources Defense Council (NRDC) v. Muszynski*, the Second Circuit ruled that "daily" could mean "seasonally" or "annually" in the context of total maximum *daily* load standards of the CWA, because such an interpretation allowed the Environmental Protection Agency (EPA) to "best serve[] the purpose of effective regulation of pollutant levels in waterbodies."⁶

In 2006, the D.C. Circuit reached the opposite conclusion in *Friends of the Earth v. EPA*.⁷ The panel ruled "daily" means what it says: every day.⁸ The opinion made strong analogies to common societal understandings of the meaning of "daily" to highlight the apparent absurdity of the Second Circuit's holding in *Muszynski*: "Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of 'give us our daily bread' as a prayer for sustenance on a seasonal or annual basis."⁹ The panel instructed EPA and amicus D.C. Water and Sewer Authority (WASA) that if they want "daily" to mean something other than "every day," then they should ask Congress to change the definition.¹⁰ Until then, the

3. Amena H. Saiyid, *Wetlands Restoration, Infrastructure Funding At Center of Agenda for Agency and Congress*, 37 Env't Rep. (BNA) S-29 (Jan. 20, 2006) ("EPA notes that roughly 34,000 impaired waters are listed by 50 states and territories with about 59,000 impairments from multiple pollutants.").

4. 33 U.S.C. § 1313 (2006).

5. *Id.* § 1313(d).

6. *Muszynski*, 268 F.3d at 99.

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

8. *Id.* at 144.

9. *Id.* (quoting *Matthew 6:11* (King James)).

10. *Id.* at 148.

common usage definition of “daily” is how the statute must be applied. EPA disagrees with this interpretation and believes the *Friends of the Earth* decision should only apply to TMDLs within the limited geography of the D.C. Circuit.¹¹ WASA and the amicus industry group, the National Association of Clean Water Agencies, petitioned the U.S. Supreme Court to review the circuit court decision.¹² In response, EPA released a revised interpretation of “daily,” which the agency claimed accounts for *Friends of the Earth*, and asked the Court to deny certiorari.¹³ In January 2007, the Court rejected the water agencies’ petition.¹⁴

Any consideration of the future of TMDLs after *Friends of the Earth* requires answering two key questions surrounding the definition of “daily.” First, what interpretation of “daily” is best for the environment? And second, will EPA’s new interpretation of “daily” following *Friends of the Earth* survive judicial review? Policymakers must decide what direction to take the TMDL program following *Friends of the Earth*. It could be argued that neither of the courts’ interpretations of “daily” is best for improving water quality. Neither the “daily” nor the “seasonal” interpretation is perfect. An “every day” standard is not always the best time period to monitor pollutants, making the D.C. Circuit’s strict interpretation problematic in some situations. On the other hand, allowing EPA more flexibility in setting time standards for pollutant monitoring creates opportunities for the agency to set lower environmental standards. A seasonal or annual standard creates a loophole for polluters to average their pollutant levels over time and avoid violations for short-term pollution surges.

Following *Friends of the Earth*, EPA appears at first glance to have sought a middle ground on the meaning of “daily.” However, upon closer examination, the agency’s revised policy accounts for the *Friends of the Earth* ruling in form only. The policy revision functionally allows for many of the same loopholes as the EPA policy rejected by the D.C. Circuit. Despite the seemingly identical policy put forth by the agency before and after *Friends of the Earth*, the form change may be enough

11. Amena H. Saiyid, *EPA Asks Supreme Court to Reject Petition Seeking Clarity on Daily Discharge Limits*, 37 Env’t Rep. (BNA) 2446 (Dec. 1, 2006).

12. Brief for National Association of Clean Water Agencies & Wet Weather Partnership as Amici Curiae Supporting Petitioner, *D.C. Water & Sewer Auth. v. Friends of the Earth, Inc. (WASA)*, 127 S. Ct. 1121 (2007) (No. 06-119), 2006 WL 2506651; Petition for Writ of Certiorari, *WASA*, 127 S. Ct. 1121 (2007) (No. 06-119), 2006 WL 2506651.

13. Memorandum from Benjamin H. Grumbles, Assistant Adm’r, U.S. EPA, to Director, Office of Ecosystem Protection (Region 1), U.S. EPA et al. (Nov. 15, 2006) (on file with author); see also *Memo Clarifying EPA’s Position on the Use of Daily Time Increment When Establishing Total Maximum Daily Loads for Pollutants*, 37 Env’t Rep. (BNA) 2464 (Dec. 1, 2006); Saiyid, *supra* note 11.

14. *D.C. Water & Sewer Auth. v. Friends of the Earth, Inc.*, 127 S. Ct. 1121 (2007).

for the agency's action to withstand judicial review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵

Looking to the future, Congress and EPA should remember the ultimate goal of the CWA to restore the health of our nation's waters. A rigid interpretation of "daily" for TMDLs potentially provides a powerful tool to promote this goal. Vigorous enforcement and the equitable application of regulations can achieve greater pollution reductions by spreading the regulatory burden beyond point sources to all polluters.

Part I of this Note outlines the relevant provisions of the CWA and then describes the background and holdings in *NRDC v. Muszynski* and *Friends of the Earth v. EPA*. Part II focuses on the legal analysis in the two cases, in particular the courts' divergent use of various canons of statutory interpretation within the *Chevron* analysis. Part III considers the policy implications of the Second Circuit and D.C. Circuit opinions and issues of equity in water pollution regulation following *Friends of the Earth*. Finally, in Part IV, EPA's new policy following *Friends of the Earth* is described, its impacts on the environment are considered, and the policy's potential to survive judicial review is analyzed.

I. THE CLEAN WATER ACT TMDL PROVISION AND THE CIRCUIT SPLIT ON "DAILY"

Two federal courts of appeals have reached different conclusions on the meaning of "daily" in the CWA. Each employed distinct tools of analysis to reach their divergent opinions. In *Friends of the Earth v. EPA*, the D.C. Circuit concluded "daily" means "every day."¹⁶ Central to the panel's analysis was the ruling that there was nothing ambiguous about the statutory text. Applying the seminal Supreme Court opinion on statutory interpretation, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁷ the court, because of the lack of ambiguity in the term, refused to give deference to the agency's interpretation of "daily."

15. 467 U.S. 837 (1984). *Chevron* articulates the two questions a court must consider when reviewing "an agency's construction of the statute which [the agency] administers":

[*Chevron* step one:] First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

[*Chevron* step two:] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

16. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006).

17. *Id.*

Meanwhile, a Second Circuit panel in *NRDC v. Muszynski*, found “daily” could mean “seasonally” or “annually” so long as EPA gave good reason why the interpretation should stray from the plain meaning of the word.¹⁸ Notably, the Second Circuit applied the absurdity doctrine to find ambiguity in the meaning of “daily” and focused its interpretation on the entire statute, as opposed to the D.C. Circuit’s textual focus on the word “daily” alone.¹⁹

A. *The Clean Water Act’s TMDL Provision*

The CWA provides two main mechanisms for cleaning up and maintaining the nation’s waterways: technology-based controls and ambient water monitoring standards.²⁰ As the first option for regulators, technology-based controls cut off pollution at its source through pollution abatement technology requirements.²¹ This policy presumes technology will enable polluters to reach pollution control targets²² and the corresponding water quality standards, and focuses on point source polluters, such as those with a specific outflow pipe that can be easily traced back to the pollution’s original source.

When regulation of point sources by these methods alone does not achieve “fishable, swimmable water,”²³ the CWA dictates the adoption of “total maximum daily load[s].”²⁴ TMDLs create a pollution budget describing “how much of a pollutant a water body can tolerate on a daily basis and still meet the relevant water quality standards.”²⁵ A supposedly “objective, quantitative standard against which water quality can be measured,”²⁶ TMDLs provide an opportunity to reach beyond point sources and regulate nonpoint sources such as agricultural runoff and stormwater. In establishing the TMDL, regulators consider “all of the

18. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001).

19. *Id.*

20. 33 U.S.C. § 1313 (2006).

21. *Id.* For regulations on the National Pollutant Discharge Elimination System (NPDES) see 40 C.F.R. §§ 122–124 (2007). “The regulatory provisions contained in this part and parts 123, and 124 of this chapter implement the National Pollutant Discharge Elimination System (NPDES) Program under sections 318, 402, and 405 of the Clean Water Act (CWA) (Public Law 92–500, as amended, 33 U.S.C. 1251 et seq.)” 40 C.F.R. § 122.1(a).

22. 33 U.S.C. § 1311 (2006).

23. *Id.* § 1251(a)(2) (1976) (describing the goal of the modern CWA to achieve “fishable” and “swimmable” water by 1983); see also James L. Arts & William L. Church, *Soil Erosion—The Next Crisis?*, 1982 WIS. L. REV. 535, 543 n.21 (noting that “the 1972 amendments to the Federal Water Pollution Control Act set interim goals of ‘fishable’ and ‘swimmable’ water by the year 1983” (citing 33 U.S.C. § 1251(a)(2) (1976))).

24. 33 U.S.C. § 1313(d) (2006).

25. JENNIFER RUFFOLO, TMDLS: THE REVOLUTION IN WATER QUALITY REGULATION, at i (1999).

26. *Id.*

sources of the pollutant in the watershed combined” and then limit each watershed “to discharging no more than the total limit” established by the TMDL.²⁷

The TMDL framework provides states with the greatest flexibility to choose the appropriate methods to control diffuse sources of pollution within their borders. Section 303(d) of the CWA requires states to establish priority rankings among polluted waters “taking into account the severity of the pollution and the uses to be made of such waters.”²⁸ States then must establish—in order of priority—the “total maximum daily load, for those pollutants which the [EPA] Administrator identifies...as suitable for such calculation.”²⁹ EPA must approve the TMDLs the state establishes to limit the loading (or release) of pollutants into a water body.³⁰ “The upshot of this intricate scheme is that the CWA leaves to the states the responsibility of developing plans to achieve water quality standards if the statutorily-mandated point source controls will not alone suffice.”³¹ TMDLs thus allow the states to proceed from the identification of waters requiring additional planning to the required plans.³² This essential link in the implementation chain for the reduction of point and nonpoint source water pollution remains central to the CWA’s end goal—attaining national water quality standards.³³

Despite their enormous potential as a regulatory tool, TMDLs remained largely dormant until environmentalists discovered them in the early 1990s and filed lawsuits to force the development of TMDL standards for polluted waterways throughout the country.³⁴ Today, TMDLs offer an open horizon in water pollution law by providing an opportunity to address the point and nonpoint sources EPA has failed thus far to effectively regulate.

27. *Id.*

28. 33 U.S.C. § 1313(d)(1)(A) (2006).

29. *Id.* § 1313(d)(1)(C); *see also* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978) (EPA deemed “all pollutants . . . suitable for the calculation of total maximum daily loads.”). The D.C. Circuit Court in *Friends of the Earth v. EPA* noted that “this regulation remains unchanged today.” 446 F.3d 140, 143 (D.C. Cir. 2006).

30. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001) (citing 33 U.S.C. § 1313(2)).

31. *Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002).

32. *See Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 984–85 (9th Cir. 1994).

33. *Pronsolino*, 291 F.3d at 1129.

34. *See, e.g., Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 539 (S.D.N.Y. 2000), *aff’d sub nom. Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001) (“Notwithstanding the fact that EPA was not pushing the states to develop TMDLs during the 1980s, New York was beginning to satisfy its obligation under § 303(d), unlike many states that turned a blind eye to the provision. Nonetheless, it is conceded by defendants that actual efforts to develop, submit, and approve TMDLs that comply with statutory requirements did not begin in earnest until this lawsuit was commenced.”); *see also* RUFFOLO, *supra* note 25, at i–ii (summarizing some of the early TMDL litigation).

The largest potential environmental benefit from TMDLs, and the source of the program's greatest opposition, lies in TMDLs' potential to regulate nonpoint source water pollution largely unregulated by the CWA. Thus far, delays caused by lack of funding, enormous demands for scientific data, and a lack of political will have plagued the implementation of TMDLs.³⁵ The Bush Administration in particular has resisted TMDL implementation.³⁶ After meeting privately with industry in January 2002, the Office of Management and Budget "placed TMDLs on a short list of 'outdated or outmoded' rules."³⁷

TMDLs, where successfully implemented, however, have reduced pollution significantly. Several major rivers and lakes have lowered pollution loads as a result of successful TMDL implementation.³⁸ The Lower Yakima River TMDL reduced the amount of sediment pollution from farm soil erosion from 280 tons to 65 tons by using a TMDL which implemented the plain meaning of "daily."³⁹ Average phosphorus concentrations in Idaho's Cascade Reservoir decreased over 50 percent in seven years due to a TMDL developed in the surrounding watershed.⁴⁰ Along the most developed 94-mile stretch of Idaho's Snake River, the threat of a government-imposed TMDL standard forced industry to work together to allocate pollution reductions to meet state TMDL goals.⁴¹

B. NRDC v. Muszynski

NRDC v. Muszynski arose when NRDC challenged EPA's decision to approve TMDLs for phosphorus for eight New York reservoirs. These reservoirs provide drinking water to about nine million people in and around New York City.⁴² Regulators were concerned about high levels of phosphorus, which can provide an environment where problematic

35. Oliver A. Houck, *The CWA TMDL Program V: Aftershock and Prelude*, 32 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10,385 (Apr. 2002).

36. *Id.*

37. *Id.* at 10,386 (citing *New OMB List Targets Eight Major EPA Rules for Possible Rollback*, INSIDE EPA, Jan. 4, 2002, at 1.).

38. See U.S. EPA Region 10, TMDL Success Stories, Lower Yakima River TMDL (Feb. 2002), <http://yosemite.epa.gov/R10/WATER.NSF/TMDLs/TMDL+Program> (follow "TMDL Success Stories") (last visited Sept. 1, 2007).

39. David Lester, *What's in your water?*, YAKIMA HERALD-REPUBLIC, Oct. 15, 2006; see also U.S. EPA Region 10, *supra* note 38; Telephone Interview with Ryan Anderson, Regional TMDL Lead for Cent. Wash., Wash. State Dep't of Ecology Water Quality Program (Nov. 15, 2006).

40. See U.S. EPA Region 10, *supra* note 38.

41. *Id.*

42. Susan S. Lang, *CU researchers get grant to find ways to prevent phosphorus pollution in New York City's third-largest reservoir*, CHRONICLE ONLINE, Oct. 24, 2005, <http://www.news.cornell.edu/stories/Oct05/protecting.NYC.water.ssl.html> (last visited Sept. 1, 2007).

cyanobacteria may flourish.⁴³ “Cyanobacterial blooms can cause a range of water quality problems, including summer fish kills, bad odours, and tainted drinking water. Some cyanobacteria produce toxins that can kill livestock and wildlife.”⁴⁴

In the years preceding the litigation, nineteen New York state reservoirs suffered from increased levels of phosphorus pollution from sewage and nonpoint sources.⁴⁵ Municipal sewage treatment plants were, and still are, the primary point source for phosphorus in the New York City water supply system. Nonpoint sources, such as poorly managed septic tanks and “runoff from agricultural lands treated with manure” are also blamed for polluting waterways with large amounts of phosphorus.⁴⁶ The phosphorus levels were bringing reservoirs to the brink of becoming eutrophic⁴⁷—threatening their viability as a water source and creating a danger for public health.

Regulators seeking to protect this important resource had to consider the impact of the high capital costs wastewater regulations would have on local economic development.⁴⁸ In doing so, New York established seasonal and annual loads, rather than a daily standard, for phosphorus.⁴⁹ After EPA approved the state plan, NRDC sued, arguing that TMDLs should be set on a daily time standard.⁵⁰

When the case came before a federal district court in New York, the judge deferred to EPA’s interpretation of the proper levels to limit phosphorus in the reservoirs, concluding that “in the face of conflicting evidence at the frontiers of science, courts’ deference to expert determinations should be at its greatest.”⁵¹ On appeal, a panel of Second

43. Environment Canada, Canadian Water Quality Guideline, Phosphorus, http://www.ec.gc.ca/ceqg-rcqe/English/Html/GAAG_Phosphorus_WQG.cfm (last visited Sept. 1, 2007).

44. *Id.*

45. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 94–95 (2d Cir. 2001).

46. NAT’L RESEARCH COUNCIL COMM’N ON GEOSCIENCES, ENV’T & RESOURCES, WATERSHED MANAGEMENT FOR POTABLE WATER SUPPLY: ASSESSING THE NEW YORK CITY STRATEGY 158–66 (2000), available at <http://books.nap.edu/openbook.php?isbn=0309067774&page=158>.

47. “Eutrophication is the ‘normally slow aging process by which a lake evolves into a bog or marsh. . . . During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby ‘choking’ the lake.” *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 552 n.18 (S.D.N.Y. 2000) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 112 n.15 (1992)), *aff’d sub nom. Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

48. Lang, *supra* note 42 (citing Cornell University Professor Tammo Steenhuis, a member of an interdisciplinary research team searching for ways to reduce the impacts of phosphorus pollution on one of New York City’s major drinking water reservoirs).

49. *Muszynski*, 268 F.3d at 93.

50. *Id.* at 97.

51. *Id.* at 99 (citing *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000)).

Circuit judges⁵² promoted deference to the executive branch by finding ambiguity in the statutory text, and upheld the agency's interpretation that "daily" could mean "seasonally" or "annually."⁵³ The panel ruled that NRDC's interpretation of the CWA was "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one."⁵⁴ The panel then relied on cases promoting deference to agencies when the courts find ambiguity in the meaning of a word.⁵⁵

The panel rejected NRDC's argument that "the CWA calls for establishment of a "'total maximum daily load,' not an hourly, weekly, monthly, or annual load."⁵⁶ Instead, the court ruled that "the term 'total maximum daily load'" is ambiguous because it is "susceptible to a broader range of meanings," including the possibility that "daily" could mean "seasonally" or "annually" "where such an alternative measure best serves the purpose of the effective regulation of pollutant levels in water bodies."⁵⁷ Employing canons of statutory construction, such as the whole act rule and the absurdity doctrine,⁵⁸ the panel ruled that the plain meaning interpretation of "daily" was "overly narrow" and "los[t] sight of the overall structure and purpose of the CWA."⁵⁹ The panel utilized the whole act rule in concluding that it would be "absurd" for Congress to have intended EPA to "narrowly" confine its "far-ranging . . . expertise" in regulating pollutant loads "on a strictly daily basis."⁶⁰ However, the opinion did not cite any legislative history or other sources to support its congressional intent argument.⁶¹ In its final step, granting deference to EPA, the court cited *United States v. Mead Corp.*⁶²—a post-*Chevron* case promoting deference to an agency's interpretation of a statute that it is entrusted to administer.⁶³

52. The judges on the panel were Ralph Winter (Reagan appointee), Joseph McLaughlin (George H.W. Bush appointee) and Rosemary Pooler (Clinton appointee). The opinion was written by Judge Pooler.

53. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001).

54. *Id.* at 99.

55. *Id.* at 98–99.

56. *Id.* at 98.

57. *Id.* at 98–99.

58. *Id.*

59. *Id.* at 98.

60. *Id.* at 98–99.

61. *See id.*

62. *Id.* at 98 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

63. *Id.* (quoting *Mead*, 538 U.S. at 227–28 ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer")).

C. Friends of the Earth v. EPA

In 2006, *Friends of the Earth v. EPA* revisited the interpretation of “daily” in the context of “total maximum daily load.”⁶⁴ The D.C. Circuit rejected the Second Circuit’s ruling, deciding instead that the definition of “daily” was unambiguous.⁶⁵

1. Background

When Captain John Smith first sailed up the Anacostia River in 1608, he found a vibrant river bisecting dense hardwood forests teeming with wildlife.⁶⁶ He described the Anacostia as a “crystal” river.⁶⁷ As the first European to venture into the river system extending from Chesapeake Bay, Smith received a warm welcome from the Anacostan people, after whom the river is named.⁶⁸

Four hundred years after Smith’s arrival, impermeable surfaces cover more than half of the river’s 176-mile watershed where approximately one million people make their home.⁶⁹ Roughly one-quarter of the 27,000 acres of forest Smith first saw remains today.⁷⁰ Development and dredging by the Army Corps of Engineers to create shipping lanes and to construct a naval shipyard—now one of the river’s largest polluters—has destroyed 90 percent of the wetlands.⁷¹ Another major problem stems from the fact that one-third of the Washington, D.C.’s sewage is handled by a Combined Sewage Overflow system built in the nineteenth century.⁷² This system carries storm water and sanitation water together. When the system is overloaded during a winter storm, sewage has no place to go and is dumped into the Anacostia. Each year, more than two billion gallons of a toxic mix of human waste,

64. 446 F.3d 140, 146 (2006).

65. *Id.*

66. The Anacostia: River of Recovery—Natural History of the Anacostia Watershed, <http://www.dnr.state.md.us/forests/anacostia/nhaw.html> (last visited Sept. 1, 2007); see also Anacostia Watershed Network, <http://www.anacostia.net/history.htm> (last visited Sept. 1, 2007); Chesapeake Bay Gateways Network, Captain John Smith’s Chesapeake Bay Voyages: Native Peoples of the Chesapeake, <http://www.baygateways.net/nativepeoples.cfm> (last visited Sept. 1, 2007).

67. Scott Faber, *There’s Still Hope for the Anacostia In Spite of All the Strikes Against It*, CHESAPEAKE BAY JOURNAL, Dec. 4, 2006.

68. See references, *supra* note 66.

69. Ray Rivera & Elizabeth Williamson, *Anacostia Pollution Limits Tightened; EPA Ordered to Make Caps for River*, WASH. POST, Apr. 26, 2006, at B1.

70. The Anacostia: River of Recovery, *supra* note 66.

71. Rivera & Williamson, *supra* note 69; see also Anacostia Watershed Network, *supra* note 66; Chesapeake Bay Gateways Network, *supra* note 66.

72. D.C. Water and Sewer Authority, http://www.dcwasa.com/education/css/combined_sewer.cfm (last visited Sept. 1, 2007).

chemicals, fertilizers, and car exhaust residues flow into the “forgotten river.”⁷³ As the river flows south, it travels from Maryland through many of the city’s poorest African American neighborhoods before emptying into the Potomac River.⁷⁴ This high volume of pollution contributes to the river’s “dubious distinction as being one of the ten most polluted rivers in the country.”⁷⁵

With its slew of water quality problems, the Anacostia is identified under section 303(d) of the CWA as an “impaired” water body, requiring the establishment of TMDLs.⁷⁶ Two key TMDL standards were the subject of the *Friends of the Earth* litigation.⁷⁷ The first is the river’s troubling low level of dissolved oxygen. Attributed to a high volume of biochemical pollutants that consume oxygen, the river’s dissolved oxygen level had fallen below the applicable water quality standard.⁷⁸ This violation puts aquatic life in the river at risk of suffocation.⁷⁹ The other problem is the river’s murkiness, which violates the applicable turbidity standard.⁸⁰ Highly turbid water appears murky and scatters light, which stunts the growth of plants relying on sunlight and makes the river unappealing for recreation.⁸¹ “To remedy these violations, EPA approved one TMDL limiting the *annual* discharge of oxygen-depleting pollutants, and a second limiting the *seasonal* discharge of pollutants contributing to turbidity.”⁸² Neither total maximum *daily* load limited daily discharges.⁸³ Friends of the Earth sued, “claim[ing] that EPA acted improperly by (1) calculating TMDLs on an annual and seasonal basis rather than a daily basis, (2) approving TMDLs that achieve annual and seasonal but not *daily* water quality standards, and (3) assigning wasteloads to categories of sources instead of to individual point sources.”⁸⁴

73. Fred A. Bernstein, *Revitalizing The Banks of “Washington’s Forgotten River”*, N.Y. TIMES, Mar. 27, 2005; Rivera & Williamson, *supra* note 69; *see also* D.C. Water & Sewer Authority, *supra* note 72.

74. Bernstein, *supra* note 73; *see also* Anacostia Watershed Network, *supra* note 66; Chesapeake Bay Gateways Network, *supra* note 66.

75. *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006) (quoting *Kingman Park Civic Ass’n v. EPA*, 84 F. Supp. 2d 1, 4 (D.D.C. 1999)).

76. 33 U.S.C. § 1313 (2006).

77. *Friends of the Earth*, 446 F.3d at 143.

78. *Id.*

79. *Id.*

80. *Id.*; *see also* Chattahoochee Riverway Project: Understanding Turbidity, <http://ga2.er.usgs.gov/bacteria/helpturbidity.cfm> (“Turbidity is the amount of particulate matter that is suspended in water.”) (last visited Sept. 1, 2007).

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

82. *Id.*

83. *Id.* (emphasis added).

84. *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182, 185 (D.D.C. 2004), *rev’d*, 446 F.3d 140 (D.C. Cir. 2006).

2. District Court Decision

D.C. District Court Judge Ricardo M. Urbina agreed with EPA's application of annual or seasonal discharges under the TMDL program. He concluded the text of the CWA did not "reveal a clear congressional intent to require EPA to calculate only daily TMDLs."⁸⁵ After finding ambiguity in the meaning of "daily" within the context of the whole CWA, Judge Urbina utilized *Chevron* analysis to reach his decision that EPA's interpretation of "daily" to mean "seasonally" or "annually" was reasonable.⁸⁶ Given this ambiguity, and the ruling that the agency's interpretation was reasonable, *Chevron* dictates the court must defer to the agency.⁸⁷ Therefore, Judge Urbina held the agency's approval of the seasonal and annual TMDLs satisfied the CWA and was neither arbitrary nor capricious.⁸⁸

3. D.C. Circuit Decision

On appeal, EPA argued that the D.C. Circuit should affirm Judge Urbina's ruling, which supported a relatively flexible standard. Pointing to policy justifications for its decision to utilize seasonal and annual standards, the agency claimed that "bodies of water can therefore sometimes tolerate large one-day discharges of pollutants, so long as seasonal or annual discharges remain relatively low."⁸⁹ Because pollutants can damage waterways in a multitude of ways, the agency contended that it needs flexibility in addressing pollution.⁹⁰ The agency further argued that Congress, "in requiring the establishment of [TMDLs] to cap effluent discharges of 'suitable' pollutants into highly polluted waters, left room for EPA to establish seasonal or annual loads for those same pollutants."⁹¹

A three-judge panel composed of David S. Tatel,⁹² Janice Rogers-Brown,⁹³ and Thomas Griffith,⁹⁴ unanimously rejected EPA's argument, ruling that "daily means daily, nothing else."⁹⁵ Reversing and remanding the district court's decision, Judge Tatel's opinion noted that "if EPA

85. *Id.* at 189.

86. *Id.* at 194–95.

87. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

88. *Friends of the Earth*, 346 F. Supp. at 189.

89. *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

90. *Id.*

91. *Id.* at 142.

92. Judge Tatel was appointed by President Clinton.

93. Judge Rogers-Brown was appointed by President G. W. Bush.

94. Judge Griffith was appointed by President G. W. Bush.

95. *Friends of the Earth v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006).

believes using daily loads for certain types of pollutants has undesirable consequences, then it must either amend its regulation designating all pollutants as 'suitable' for daily loads or take its concerns to Congress."⁹⁶ The CWA speaks "unambiguously in requiring daily loads."⁹⁷

The D.C. Circuit, like the *Muszynski* court, looked to the text as a guide for congressional intent, yet concluded the words of the CWA dictated different action.⁹⁸ The judges did cede that "EPA advances a reasonable policy justification for deviating from a statute's plain language."⁹⁹ Despite this finding, such a reasonable policy does not allow EPA to ignore its "obligation" set out in the CWA "to establish daily loads by approving non-daily loads, whatever the wisdom of that accommodation."¹⁰⁰

The D.C. Circuit also rejected a separate argument by the D.C. Water and Sewer Authority (WASA) that upgrading their antiquated sewage system to comply with daily loads would be "prohibitively expensive."¹⁰¹ The fact that Congress did not consider Combined Sewer Overflow (CSO) systems, such as the one in the Washington, D.C. area affecting the Anacostia, did not change the Act's mandate.¹⁰² "Unintended consequences for water quality or for municipal pocketbooks" may result from this mandate, the court noted, but the power to remedy the situation lies with Congress, not the courts.¹⁰³

To reach its holding, the D.C. Circuit, like the lower court, reviewed EPA's interpretation of the phrase "total maximum daily load" under *Chevron*.¹⁰⁴ Unlike the district court, the D.C. Circuit found Congress' language and intent to be clear.¹⁰⁵ Applying *Chevron's* two-step approach, the court determined the plain meaning of the statute and precluded the need to proceed to step two.¹⁰⁶

If Congress wanted seasonal or annual loads, it could easily have authorized them by calling for "total maximum daily, seasonal, or annual loads." Or by providing for the establishment of "total maximum loads," Congress could have left a gap for EPA to fill.

96. *Id.* at 143.

97. *Id.* at 148.

98. *Id.* at 146.

99. *Id.*

100. *Id.*

101. *Id.* at 147.

102. *Id.* at 148.

103. *Id.*

104. *Id.* at 144 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); see also *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988) (applying *Chevron* to EPA's interpretation of the CWA).

105. *Id.* at 144 (citing *Chevron*, 467 U.S. at 842-43).

106. *Chevron*, 467 U.S. at 842-43.

Instead, Congress specified “total maximum *daily* loads.” We cannot imagine a clearer expression of intent.¹⁰⁷

To reach the second step in *Chevron* analysis, allowing the agency to avoid the literal interpretation of “daily,” the agency “must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.”¹⁰⁸ In an apparent rejection of the *Muszynski* court’s analysis, the D.C. panel expressed the limitations of a court’s powers. A court cannot “set aside a statute’s plain language simply because the agency thinks it leads to undesirable consequences in some applications.”¹⁰⁹ In further support of its holding, the panel cited EPA’s own finding that “all pollutants . . . [are] suitable for the calculation of total maximum daily loads.”¹¹⁰

The panel checked EPA’s discretionary powers by ruling that the agency “may not ‘avoid the Congressional intent clearly expressed in the text simply by asserting that the agency’s preferred approach would be better policy.’”¹¹¹ The court strengthened this reasoning by citing other precedent supporting the court’s deference to Congress and the judges’ inability to “set aside a statute’s plain language simply because the agency thinks it leads to undesirable consequences in some applications.”¹¹²

Judge Tatel analogized EPA’s argument to that made in *Sierra Club v. EPA*—a case addressing a challenge to EPA’s extension of Washington, D.C.’s attainment deadline for meeting Clean Air Act ozone standards.¹¹³ EPA had argued in *Sierra Club* that Congress could not have intended to treat Washington, D.C. as a nonattainment area simply because pollution had blown in from downwind states.¹¹⁴ In rejecting the agency’s argument, the D.C. Circuit looked to the legislation itself as a guide, revealing no intention to make an exception for a situation such as the one the EPA described.¹¹⁵ Citing the textualist reasoning from *Sierra Club* that “the most reliable guide to Congressional intent is the legislation Congress enacted,”¹¹⁶ the *Friends of the Earth* panel followed

107. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006).

108. *Id.* at 146 (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

109. *Friends of the Earth*, 446 F.3d. at 145 (citing *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002)) and noting that “EPA took a strikingly similar position to the one it advances” in *Friends of the Earth*).

110. *Id.* at 144 (citing Total Maximum Daily Loads under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978)).

111. *Id.* at 145 (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

112. *Id.* at 146; see also *Sierra Club*, 294 F.3d 155.

113. *Sierra Club*, 294 F.3d at 158; *Friends of the Earth*, 446 F.3d at 145.

114. *Sierra Club*, 294 F.3d at 161.

115. *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006).

116. *Id.* at 145 (quoting *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002)).

its own reasoning consistently in finding: “Just as EPA may not extend a deadline in contravention of a plain congressional mandate, the agency may not fulfill its obligation to establish daily loads by approving non-daily loads, whatever the wisdom of that ‘accommodation.’”¹¹⁷

Separately from EPA’s legislative interpretation arguments, WASA focused on the policy implications of finding the plain meaning of “daily” and how the court should avoid a textualist interpretation. The sanitation district pointed to the negative economic consequences of a ruling that “daily” means “every day.” This interpretation “would require the ‘complete separation’ of the sewer system—that is, the independent construction of independent stormwater and sewage pipes”—requiring a significant investment by the municipality.¹¹⁸ The court rejected the legal relevance of this argument. Nothing in the legislative history supported WASA’s argument, and nothing in Congress’ CSO policy would validate interpreting “daily” to mean anything other than “every day,” the court ruled.¹¹⁹ Ultimately, the court deferred to Congress, noting that the impact of the decision on the municipality’s fiscal situation was an issue for Congress, not the courts, to address.¹²⁰

II. LEGAL IMPLICATIONS

A. *Judicial Review of Agency Statutory Interpretation Under Chevron*

The flexibility of some legal doctrines gives the judiciary the freedom to answer even the most seemingly straightforward questions in any number of ways.¹²¹ The divergent interpretations of “daily” in the context

117. *Friends of the Earth*, 446 F.3d at 146.

118. *Id.* at 147.

119. *Id.*

120. *Id.* at 148.

121. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006). Politics does play a role in decisions about judicial deference. Miles and Sunstein analyzed “all Supreme Court decisions between 1989 and 2005 that reviewed agency interpretations of law,” and 253 opinions from “1990 to 2005 in which federal judges reviewed interpretations of law by EPA and the NRLB.” They found:

On the Supreme Court, conservative justices vote to validate agency decisions less often than liberal justices. Moreover, the most conservative members of the Supreme Court show significantly increased validation of agency interpretations after President Bush succeeded President Clinton, and the least conservative members of the Court show significantly decreased validation rates in the same period. In a similar vein, the most conservative members of the Court are less likely to validate liberal agency interpretations than conservative ones, and the least conservative members of the Court show the opposite pattern.

of the CWA's "total maximum daily load" by the D.C. and Second Circuits Courts serves as one poignant example of the difficulties with consistency in judicial legislative interpretation. How these courts apply the most cited case in modern public law, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, seemingly comes down to a decision about the particular school of statutory interpretation the judge or majority subscribes to and the impending policy implications of that decision. Justice Antonin Scalia best sums up judges' value systems and how they influence their application of *Chevron*:

[W]here one stands on this last point—how clear is clear—may have much to do with where one stands on . . . what *Chevron* means and whether *Chevron* is desirable. In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. . . . Contrariwise, one who abhors, a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference.¹²²

The basic question before the court is just as Scalia describes: How clear are Congress' words? The D.C. Circuit answered by finding Congress' words to mean just what they say in terms of their plain usage—"daily" means "every day"—and that is "the end of the matter."¹²³ The Second Circuit, on the other hand, found Congress' words to be subject to a "broad range of meanings," therefore justifying the panel's deference to the expertise of the agency to properly interpret congressional intent.¹²⁴

Id. On its face, Sunstein's analysis does not appear to apply to the circuit split in this situation because both panels are composed of two Republican appointees and one Democratic appointee, yet they reached opposing holdings.

122. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

123. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

124. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

*B. The Court's Use of Canons of Statutory Interpretation
in Step 1 of the Chevron Analysis*

Contrary to the D.C. Circuit Court's conclusion which followed a textual interpretation of the statutory provision and focused on the ordinary usage of "daily," the Second Circuit curiously utilized several canons of statutory interpretation to reach *Chevron* step two, allowing the court to defer to the agency's interpretation.¹²⁵ The Second Circuit reached its conclusion by looking at the term in the context of the whole CWA statute. The decision goes beyond the words of the statute to make a policy judgment on the use of TMDLs. Beginning with "the plain meaning of a statute,"¹²⁶ the Second Circuit found "daily" in "total maximum daily load" is "susceptible to a broader range of meanings" than just "daily."¹²⁷ The panel utilized the absurdity doctrine to support its ruling of ambiguity by noting such plain meaning to be "absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one."¹²⁸ In rejecting NRDC's argument for a strict textualist interpretation of "daily," the Second Circuit found it better policy to allow EPA the flexibility to regulate pollutants by whatever time standard the agency finds most effective to achieve effective CWA enforcement—be it daily, weekly, seasonally, or annually.¹²⁹ The Second Circuit failed to ever mention that EPA itself found that all pollutants are suitable for daily regulation.¹³⁰

Contrary to the Second Circuit, the D.C. Circuit did not find ambiguity in the congressional intent of the text and concluded that "daily" means "every day."¹³¹ On the first step of *Chevron*, *Friends of the Earth* rejected *Muszynski*, instead concluding the proper interpretation of "daily" is the plain meaning of the word.¹³²

125. When courts applying *Chevron* find ambiguity in a statutory term, they rarely overturn the agency's interpretation. There are arguably only two cases where the U.S. Supreme Court has struck down an agency action on step two of the *Chevron* analysis: *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) and *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). E-mail from Anne Joseph-O'Connell, Assistant Professor of Law, University of California, Berkeley, School of Law (Boalt Hall), to author (Apr. 9, 2007) (on file with author).

126. *Muszynski*, 268 F.3d at 98.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*; see also *Total Maximum Daily Loads Under Clean Water Act*, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978) (EPA deemed "all pollutants . . . [are] suitable for the calculation of total maximum daily loads"). *Friends of the Earth* noted that "this regulation remains unchanged today." 446 F.3d 140, 143 (D.C. Cir. 2006).

131. *Friends of the Earth*, 446 F.3d at 144.

132. *Id.* at 146.

1. *The Misuse and Limits of the Absurdity Doctrine*

Muszynski improperly applied the absurdity doctrine, leading to an incorrect ruling deferring to EPA. The absurdity doctrine should be reserved as a “safety valve,” available to judges when results of legislation meet classic examples of absurdity.¹³³ Chief Justice John Marshall described the use of the absurdity doctrine as appropriate in limited cases. “Departure from the obvious meaning of words is justifiable,” the Chief Justice wrote in 1819, “[when] the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”¹³⁴

All mankind would not agree that the application of “daily” to mean “every day” is “monstrous.” The D.C. Circuit, a well-informed portion of mankind, did not find the plain meaning of “daily” to be monstrous. Instead, the judges unanimously agreed the plain meaning makes perfect sense.¹³⁵ Believing “all mankind would” agree that “daily” should mean something other than “every day,” is what is absurd in this case. Even D.C. District Court Judge Urbina, who ultimately interpreted “daily” as the Second Circuit did, rejected the absurdity doctrine as unnecessary and inappropriate.¹³⁶ He ruled that “although the court agrees with the outcome of the Second Circuit’s decision in *NRDC v. Muszynski*—namely, that EPA possesses discretion to phrase TMDLs in non-daily terms—this court does not reach the same decision as *Muszynski* by determining that literal interpretation of ‘daily’ produces ‘absurd results.’”¹³⁷

The absurdity doctrine, when used inappropriately, allows judges to reach holdings that are otherwise unjustified. The doctrine may prove

133. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868):

The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted, “that whoever drew blood in the streets should be punished with the utmost severity,” did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—“for he is not to be hanged because he would not stay to be burnt.” And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.

134. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

135. *Friends of the Earth*, 446 F.3d at 144.

136. *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182, 189 n.3 (D.D.C. 2004), *rev’d*, 446 F.3d 140 (D.C. Cir. 2006).

137. *Id.*

useful in some situations, but it must be employed with caution to avoid the problems of judicial decisionmaking stepping into the bounds of the legislature. John Manning best describes the core problem with the absurdity doctrine:

The Constitution's sharp separation of lawmaking from judging reflects a rule-of-law tradition that seeks to preclude legislatures from making ad hoc exceptions to generally worded laws. By asking judges to carve out statutory exceptions on the ground that the legislature would have done so, the absurdity doctrine calls on judges to approximate the very behavior that the norm of separation seeks to forbid.¹³⁸

The absurdity doctrine should not be used in the interpretation of "daily" because the doctrine allows the court to substitute its judgment for that of Congress. Instead, a modern textualist framework¹³⁹ provides a better mode of analysis for the court to follow because such an analysis gives deference to Congress and allows lawmakers, not the courts, to reinterpret the meaning of the text if these elected officials find a reinterpretation necessary.

Given prior experience where courts have deferred to Congress, disagreement may be warranted. History teaches us that "Congress' practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great."¹⁴⁰ Many complex factors play a role in whether legislation is introduced and ultimately passed. The meaning of "daily," even though the word's interpretation has great importance nationwide, is likely not a high priority in the tense partisan political climate occupying a federal government involved in two wars. The slim chance Congress will do anything to clarify the meaning of "daily" cuts for and against both circuit court decisions. In all likelihood, Congress will not act to overturn either decision, so the law will likely

138. John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003). Manning criticizes the present use of the absurdity doctrine by most courts as constitutionally problematic and undesirable because it displaces the role of the legislature. He proposes courts follow a "modern textualism" that reforms the absurdity doctrine by taking a "'reasonable user of language' approach that eliminates many putative absurdities that would arise under a literal meaning framework" of strict plain meaning interpretation favored by past textualists. *Id.* at 2486.

139. See *id.* at 2392–93 (discussing modern textualism and its application by judges).

140. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). But see *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 629 n.7 (1987) (rejecting Justice Scalia's dissent arguing that Congressional inaction cannot be regarded as acquiescence under all circumstances, instead finding that Congressional inaction does have "probative" value and that "any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted").

remain conflicting in the circuit courts. This makes the D.C. Circuit's call to Congress to take action if they disagree with the panel's ruling—a seemingly legitimate justification of its conclusion—instead, a hollow deferment. In the Second Circuit, the panel finds assurance in the likelihood Congress will not overturn the court's deference to EPA.

Despite the positive environmental outcome resulting from the D.C. Circuit's textualist interpretation of the CWA, textualism does not always lead to the best results for the environment. Most recently in *Rapanos v. United States*, a plurality opinion written by Justice Scalia, the strongest advocate of textualism on the Court, concluded that wetlands are not “navigable waters” under the CWA because they are “lands” not “waters,” and therefore not covered by the CWA.¹⁴¹ The opinion focused on the interpretation of “navigable waters” as defined under the CWA and Army Corps of Engineers regulations, and to what extent wetlands should be included.¹⁴² Scalia's interpretation allows for greater development of the nation's wetlands, something environmentalists strongly oppose.¹⁴³

From the standpoint of environmental policy, it is not absurd for “daily” to be defined by its ordinary usage, because this is the most protective standard for the environment contained within a statute enacted to protect the nation's water. At worst, a daily standard is overprotective, creating a buffer zone or “margin of safety”¹⁴⁴ for the health of the impaired waterway, protecting it from large seasonal influxes of pollution. On the other hand, the worst case implication of a seasonal or annual standard is the failure to meet the goals of the CWA to clean up the nation's waterways. This *Muszynski* “loophole” allows pollution to reach levels that can be catastrophic for the environment. Averaging of phosphorus levels, for example (as the Second Circuit would allow) fails to adequately regulate algae, which can remain at low levels in winter, then explode in summer, making a lake eutrophic within a week.¹⁴⁵

Those who argue against the plain meaning interpretation of “daily” in the above example claim this interpretation limit's EPA's ability to regulate a wide range of water pollutants, and that the environment

141. *Rapanos v. United States*, 126 S. Ct. 2208 (2006); see also Courtney Covington, *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 *ECOLOGY L.Q.* 799.

142. *Rapanos*, 126 S. Ct. at 2208; see also Covington, *supra* note 141.

143. See Covington, *supra* note 141.

144. 33 U.S.C. § 1313(d)(1)(C), (D) (2006).

145. Telephone interview with Vladimir Novotny, Chair, Northeastern University Department of Civil & Environmental Engineering and Director, Center for Urban Environmental Studies (Nov. 15, 2006). Professor Novotny served as an expert for NRDC in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

ultimately suffers from such rigidity.¹⁴⁶ The claim that such an interpretation limits EPA's flexibility in setting TMDLs is untrue. EPA can set daily standards for pollution and still regulate any pollutant the agency wishes with whatever other time standard found most effective—be it hourly, seasonally, or annually. Both standards can exist simultaneously. If this practice turns out to waste administrative resources, then EPA can lobby Congress to clarify the definition of “daily.” EPA has already attempted a similar type of compromise in the agency's revision of its interpretation of “daily” following the *Friends of the Earth* decision.¹⁴⁷

C. Why the D.C. Circuit Holding is Correct

The D.C. Circuit holding is the proper decision for three reasons. First, the D.C. Circuit is the expert court in issues of statutory interpretation and judicial deference to agency decisionmaking because of its role as the primary adjudicator of administrative law questions. This expertise provides for a greater familiarity with the issues and analysis required for these often complex decisions with broad policy implications. The Second Circuit does not have such expertise.

Second, “daily” does mean “every day.”¹⁴⁸ A straightforward analysis of the term's ordinary usage is all that is required to reach this finding. Following such a grounded, straightforward approach makes the law accessible to the general population, instead of confusing the issue in legal jargon. Accessibility promotes trust in the judiciary—an important goal for an institution with such broad power and impact on the nation.

Third, deferring to Congress, and not the agency, upholds important divisions between the three branches of government—leaving ultimate power to make law with the lawmakers. The lawmaking process is a complex one with intent often shielded by unknowns, which cannot always be revealed by canons of statutory construction. This is not to say there are not times for utilizing legislative history and other canons of

146. See, e.g., *Muszynski*, 268 F.3d at 98–99; see also *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

147. Memorandum from Benjamin H. Grumbles, *supra* note 13; see also *Memo Clarifying EPA's Position on the Use of Daily Time Increment When Establishing Total Maximum Daily Loads for Pollutants*, *supra* note 13.

148. Merriam-Webster's Online Dictionary defines “daily” as:

1 a: occurring, made, or acted upon every day <daily needs> **b:** issued every day or every weekday <a daily newspaper> **c:** of or providing for every day <a daily schedule> **2 a:** reckoned by the day <average daily wage> **b:** covering the period of or based on a day <daily statistics>. When “daily” is used as an *adverb*: **1:** every day; **2:** every weekday.

Merriam-Webster Online Dictionary, Definition of daily, <http://www.m-w.com/cgi-bin/dictionary/daily> (last visited Sept. 1, 2007).

statutory construction to illuminate the meaning of a word or phrase. Yet, when the term is as straightforward as the word “daily,” and the court cannot cite to any relevant legislative history leading to a different interpretation, then Congress should be taken at its word. By disguising a desire for agency deference through the use of methods such as the absurdity doctrine or other canons, the Second Circuit opens itself up to criticisms of judicial activism. *Muszynski* overrules Congress and supports an alternative policy preferred by the judges. Such judicial activism should not be upheld.

III. POLICY IMPLICATIONS FOR A NON-“EVERY DAY” INTERPRETATION OF “DAILY”

Every day TMDLs, like those required by *Friends of the Earth*, clean up polluted water bodies, benefiting public health and local economies. The Yakima River in Washington State provides a successful example of a large river meeting water quality standards by utilizing *daily* TMDLs.¹⁴⁹ Listed as an “impaired” water body because of its CWA violations, the Yakima had some of the highest concentrations of DDT in the nation—levels so high the Health Department in 1994 advised people to avoid eating fish caught in this popular fly fishing destination.¹⁵⁰ After successfully implementing a TMDL program in 1998 to reduce turbidity and curb nonpoint source pollution from agricultural runoff, the amount of sediment pollution from soil erosion from farms has been reduced from 280 tons to 65 tons.¹⁵¹ This success was achieved largely by setting long-term reduction targets for turbidity and sediment loads, followed up by the threat of enforcement.¹⁵² The TMDL framework sets the pollution levels necessary to meet these targets. Local irrigation districts worked to educate farmers and enforced a policy to reduce the water supply to these farmers if they sent highly turbid water into the Yakima.¹⁵³ In addition, the irrigation districts secured \$10 million in low interest loans “to help growers make the changes necessary to clean up water (e.g. purchase and

149. The TMDL standard used for the Yakima River is an every day standard. Telephone Interview with Ryan Anderson, *supra* note 39. *Friends of the Earth* supports this time standard. *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

150. Lester, *supra* note 39.

151. *Id.*

152. Telephone Interview with Ryan Anderson, *supra* note 39. TMDLs are important in that they provide a calculation used to meet standards and set permit limits, but the real enforcement tool is state law. According to Anderson, if polluters violate standards and pollute state waters, they can be fined up to \$10,000 per day under Washington state law. The state had to bring only one enforcement action against a single farmer for violating the state water quality regulations (and the TMDL) in order for farmers across the region to understand the penalties that they would face if they did not comply, Anderson says. All farmers have since complied, he says. *Id.*; see also U.S. EPA Region 10, *supra* note 38.

153. U.S. EPA Region 10, *supra* note 38.

install more efficient sprinkler systems).¹⁵⁴ The Yakima story is not a total victory for clean water, but in less than ten years, there is significant improvement for one of the nation's 34,000 impaired waterways. The Yakima demonstrates TMDLs can succeed where the CWA has previously failed due to the agricultural exemption from point source regulation.¹⁵⁵ Whether these successes could have been achieved through the use of non-daily TMDLs largely depends on how those standards were set.

A. *Is "Every Day" Regulation the Best Thing for the Environment?*

"Every day" TMDL regulation following *Friends of the Earth* may not be the best regulatory standard for every water body in the United States, but such a rigid standard provides greater environmental protection by avoiding the dangers of loopholes found in more flexible standards. The flexibility of the Second Circuit's "annual" or "seasonal" definition of "daily" allows EPA to specifically address individual pollutants to find the ideal time standard to regulate them. The problem with this flexible approach becomes evident when EPA chooses a longer time standard, such as an annual standard. Under such a system, polluters can ignore severe short-term pollution episodes by maintaining low levels of pollution the rest of the year, thereby meeting the annual standard when all pollution is averaged.¹⁵⁶ In the words of one critic, this would be like saying it is permissible to drive 100 miles per hour in a 55 miles per hour zone, as long as your average speed in that zone over the past month was less than 55 miles per hour.¹⁵⁷ A more rigid interpretation of "daily," like the one found in *Friends of the Earth*, requires all waterways to obey the "speed limit" every day.

According to WASA, daily limits may not be better for the environment. WASA challenges the averaging argument in its Supreme Court petition for writ of certiorari, claiming the *Friends of the Earth*

154. *Id.*

155. 33 U.S.C. § 1362(14) (2006):

The term "point source" means any discernible, 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 or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

156. According to TMDL expert Professor Oliver Houck: "The real problem with averaging, the EPA approach, is that it allows you to ignore some severely bad episodes and thus duck responsibility to clean up the act." E-mail from Oliver Houck, Professor of Law, Tulane University, to author (Oct. 6, 2006) (on file with author).

157. Telephone Interview with Mark Izeman, NRDC attorney who argued on behalf of NRDC in *Muszynski* (Nov. 9, 2007).

decision “could lead to dramatically increased costs for ratepayers, extended and widespread disruptions [of service], and *poorer water quality* if it is applied to require daily load caps on CSO discharges.”¹⁵⁸

If WASA’s argument that the daily standard is actually bad for the environment proves true, room remains to work within the D.C. Circuit’s ruling and maintain a seasonal or annual standard for pollutants best regulated in this manner. Daily levels can be set where EPA’s scientists find them to be ideally set, and then seasonal or annual levels can also be set. For example, if a reasonable daily pollution amount is 500 gallons/day (for a total of 182,500 gallons per year) and EPA wants to give the polluter some flexibility, EPA might allow the polluter to release up to 800 gallons/day, but no more than 182,500 gallons per year. This standard is inclusive of the *Friends of the Earth* ruling, while making room for the proper regulation of pollutants ideally regulated by an alternative time standard.

WASA’s argument for regulatory flexibility removes the technology-forcing aspect of TMDLs, discouraging innovation in polluting industries that are content with the status quo. If industries are not forced to meet tougher standards, then they have little incentive to upgrade their systems. The antiquated Washington, D.C. system that pollutes the Anacostia is one such example:

Every year, human waste is discharged directly—or leaks indirectly—into the Anacostia by a century-old sewage system that is overwhelmed during heavy rains and is riddled with leaks. . . . [A]bout 1.5 billion gallons of untreated wastewater are annually discharged from 16 outfalls into the Anacostia. Another 1 billion gallons is discharged into the Potomac River [on the opposite side of Washington, D.C.]¹⁵⁹

Were there to be a stricter daily water quality standard applied to the Anacostia, the sanitation industry’s feet would be held to the proverbial fire. The industry would have to upgrade its system and seek new technologies to control a severe shortfall in its sewage management system, or it could face serious enforcement actions for its water quality violations. WASA’s attempt to avoid daily regulation due to high costs holds no currency. Municipalities have the ability to issue bonds to pay for sanitation system improvements. Such a strategy has proved successful in the past and may also work in Washington, D.C. Professor Vladimir Novotny,¹⁶⁰ a nationally recognized water pollution expert,

158. Petition for Writ of Certiorari, *supra* note 12, at 18–21.

159. Faber, *supra* note 67.

160. Professor Novotny served as NRDC’s expert in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). Telephone Interview with Mark Izeman, *supra* note 157.

points to successful sanitation system upgrades in major midwestern cities such as Chicago, Milwaukee, and Cleveland. These cities also initially challenged system upgrades as being prohibitively expensive, but in the end they made the upgrades, water quality improved, and the cities were not bankrupted.¹⁶¹ Public utilities also have the ability to take advantage of cost spreading by raising rates slightly to cover costs of sanitation system upgrades. Congress is also a possible funding source.

In addition to the obvious public health and public duty arguments, municipalities should view sanitation system upgrades and the ensuing improvement in water quality as an investment in the long-term growth of the local economy. People in the United States spend about 10 percent of their income on water-related recreation and tourism, according to EPA.¹⁶² “Tourism and recreation, much of it related to areas and activities associated with water, supported jobs for more than 6.8 million people and generated annual sales of more than \$450 billion in 1996.”¹⁶³ The cleaner the municipality’s water, the greater likelihood the people may tap into this revenue stream.

Applying the *Friends of the Earth* daily standard to the private sector will likely be met with complaints from industry as an undue burden. But these standards do not have to be unduly burdensome on industry. TMDLs often take eight to thirteen years to develop,¹⁶⁴ allowing polluters significant lag time to phase in updated pollution control technologies, to reform their operations, or to make plans to develop new businesses models that will satisfy impending pollution control requirements. Much like the auto industry, which met the Clean Air Act’s challenge with the development of the catalytic converter, industries affected by a strict “daily” standard could develop new technologies when they know they face tighter long-term water quality regulations.

161. Telephone interview with Vladimir Novotny, *supra* note 145. Professor Novotny worked closely on the Milwaukee sanitation system upgrade and said that the municipality made similar arguments to WASA about the fiscal impossibility of sanitation system upgrades. But in the end the City of Milwaukee completed the upgrades, water quality has improved, and the city is solvent. According to Novotny, the city is better off because the waterways no longer smell of sewage and are now an attraction boosting the city’s economy. *Id.*

162. *EPA Says U.S. Economy Depends on Clean Water*, CNN.COM NATURE, June 9, 2000, <http://edition.cnn.com/2000/NATURE/06/09/water.economy.enn/index.html> (last visited Sept. 1, 2007).

163. *Id.*

164. *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 540 (S.D.N.Y. 2000) (concluding from the testimony of then EPA Administrator Carol Browner before the Senate Committee on Agriculture that “EPA still believes that the states reasonably require a total of 8 to 13 years to complete their TMDL development. In fact, the proposed rule suggests extending this timetable to 15 years.”), *aff’d sub nom. Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001); *see also Water Quality, Hearing Before the S. Comm. on Agriculture, Nutrition and Forestry*, S. HRG. NO. 106-699, 106th Cong. 9–11 (Feb. 23, 2000) (statement of Carol Browner, Adm’r of U.S. EPA).

In addition to the environmental benefits of the *Friends of the Earth* daily standard, the plain meaning interpretation has the benefit of promoting uniformity in regulation. Regulated parties should know how to act in every jurisdiction. Consistency promotes efficiency among business operating in multiple jurisdictions because they will not have to readjust practices for each region where the regulations could differ. Separate interpretations of “daily” in different jurisdictions adds the expense of additional time needed to navigate differing regulatory systems and the necessary business adjustments needed to comply in each jurisdiction.

Regulatory consistency enabled by a rigid “every day” TMDL interpretation also avoids a potential “race to the bottom.” Without consistency across jurisdictions, polluting industries would likely flourish in regions where CWA loopholes allow them to avoid expensive water pollution control upgrades. In the case of wastewater treatment plants, a lenient TMDL standard allows such plants to avoid upgrading their antiquated systems and for pollution to continue unabated as it has with WASA’s pollution of the Anacostia.

Applying the rigid interpretation of TMDLs also promotes good governance by making EPA less susceptible to capture by stakeholders.¹⁶⁵ Giving EPA the flexibility to interpret a clearly worded statute provides bureaucrats with the additional power that comes along with the ability to make decisions that potentially benefit one stakeholder and disadvantage another. The “revolving door” at EPA makes one hesitant to give EPA officials such broad flexibility when these regulators often come from the very industry they regulate, and often return after their stint at EPA.¹⁶⁶ The near impossibility of keeping agencies, such as EPA, insulated from politics provides further reason to maintain a rigid interpretation of congressional legislation and limit agency deference. EPA’s recent record of water pollution management helps illustrate this problem. Despite agency estimates that enough untreated sewage overflows from the nation’s sewers to fill the Empire State Building and Madison Square Garden,¹⁶⁷ the Bush Administration has taken the pressure off sanitation districts to control the discharge of raw sewage. In 2001, citing the need for further study, President Bush “shelved a regulation that would have

165. The rigid view, however, does not prevent agency capture altogether. Plenty of other points in the system allow for outside influence, such as at what levels TMDLs are set.

166. See Collected Papers of William Sanjour, EPA’s Revolving Door, <http://pwp.lincolns.net/sanjour/Revolving.htm> (last visited Sept. 1, 2007).

167. MARK DORFMAN, NATURAL RESOURCES DEFENSE COUNCIL, SWIMMING IN SEWAGE, at v (Feb. 2004), available at <http://www.nrdc.org/water/pollution/sewage/sewage.pdf>.

controlled raw sewage discharges and required the public to be notified when sewer overflows occur.”¹⁶⁸

The potential environmental benefits from a rigid interpretation of “daily” will not come easy. Significant demands for information, funding, and a need for political support¹⁶⁹ all stand in the way of a successful TMDL program.¹⁷⁰ The discharge of pollutants by every warehouse, farm, and homeowner in every imperiled watershed in the United States must be documented and checked for compliance.¹⁷¹ EPA estimates that “roughly 34,000 impaired waters are listed by fifty states and territories with about 59,000 impairments from multiple pollutants.”¹⁷² For full enforcement of TMDLs, each polluter must be checked every day by a government scientist, electronic metering system, or be trusted to self-report violations. In effect, the data requirements of a nationwide TMDL program are unrealistic and states cannot meet them without an army of scientists to take regular water samples and analyze the gathered data.¹⁷³ Mercury pollution from the air which is deposited into waterways, further complicates an already difficult problem.¹⁷⁴ These logistical barriers to enforcement likely create deterrence problems. Repeat polluters will figure out how to game the system, which is unfair to smaller players who either cannot afford the cost of enforcement or do not want to take the risks of gaming the system. Polluters who know they likely will not be closely monitored or who will be allowed to self-report pollution discharges will have little incentive to comply. Risk averse polluters will have to bear the costs of compliance and will lose out to their competitors. This is unfair to those who play by the rules and destroys confidence in a regulatory system that can be so easily undermined.

168. Natural Resources Defense Council, *Sewage Pollution Threatens Public Health*, <http://www.nrdc.org/water/pollution/sewage.asp> (last visited Sept. 2, 2007); *see also* Raw Sewage Overflow Community Right-to-Know Act, H.R. 2452, 110th Cong. (introduced May 23, 2007) (seeking to amend the CWA to provide notice to the public of sewage overflows).

169. Saiyid, *supra* note 11 (“State officials concede that not all states that develop TMDL plans actually implement them. Section 303(d) of the CWA, which requires state to develop TMDLs to address water quality, does not require implementation.”).

170. *See* Houck, *supra* note 35.

171. Saiyid, *supra* note 3 (“EPA’s latest compilation notes an increase in the number of impaired waters in the United States. States are required by Section 303(d) to calculate the total maximum daily load (TMDL) that a water body can receive from biological and chemical sources without being classified as impaired.”).

172. *Id.*

173. Houck, *supra* note 35.

174. Saiyid, *supra* note 3 (“The vast majority of water impairments from metals are due to mercury depositions from air. ‘Mercury TMDL’s [sic] require the assistance of state and federal air programs, but that coordination has been lacking If you take mercury away from the list of impairments, the remaining causes are nutrients and pathogens.” (quoting Linda Eichmiller, Deputy Director of Association of State and Interstate Water Pollution Control Administrators)).

Utilizing the rigid daily TMDL standard in *Friends of the Earth* to clean up the nation's waters will prove an expensive task, but the benefits will be worth the investment when the benefits to local recreation economies are fully realized¹⁷⁵ and quality of life is improved.¹⁷⁶ The preservation of our rivers, lakes and oceans is certainly worth the effort.

B. Establishing Equity in Water Pollution Regulation after Friends of the Earth

The discussion of TMDLs after *Friends of the Earth*, and water pollution in general, would be incomplete without mentioning the inequitable distribution of costs for pollution abatement. The lack of stringently enforced rigid TMDLs places a greater burden on point sources to reduce pollution loads,¹⁷⁷ which in turn forces pollution reductions where they are not the most cost effective. Instead of placing the burden almost entirely on point sources, as is the current practice, the application of strict TMDLs to the agricultural industries could begin to balance out this burden by forcing major nonpoint source polluters to shoulder the true cost of their pollution.

Agriculture accounts for approximately 50 percent of all water pollution.¹⁷⁸ "In some western states dominated by cattle, the number reaches 90 percent. More than 80 percent of the eutrophication of the Gulf of Mexico dead zone is attributable to farm loadings over 500 river

175. *EPA Says U.S. Economy Depends on Clean Water*, *supra* note 162.

Nearly all Americans participate in water-related recreation and tourism, spending about 10 percent of their income on recreational activities. Sales of kayaks and canoes alone exceeded \$99 million in 1996. Some 35 million American anglers spent \$38 billion in pursuit of fishing in the same year. Coastal tourism supports businesses such as hotels, resorts, restaurants, outdoor outfitters, charter fishing services, cruise lines and real estate and travel agencies, according to "Liquid Assets." A significant portion of money spent on recreation is also tied to fish and wildlife, which rely on water quality and healthy habitat for survival. Large and small game and migratory birds that depend on clean water also generate income for recreation and tourism. In 1996, nearly 14 million people spent \$20 billion hunting game and migratory waterfowl. Tourism and recreation, much of it related to areas and activities associated with water, supported jobs for more than 6.8 million people and generated annual sales of more than \$450 billion in 1996.

Id.

176. *Id.*

177. DAN FARBER, JODY FREEMAN, ROGER FINDLEY & ANN CARLSON, *CASES AND MATERIALS ON ENVIRONMENTAL LAW* 737 (7th ed. 2006) ("The absence of legal mechanisms for implementing controls on nonpoint sources has created an equity problem because water bodies that do not meet [Water Quality Standards] may result in more stringent NPDES permit limits for point sources, even when the failure to meet WQS is substantially the fault of nonpoint sources.").

178. Houck, *supra* note 35.

miles away.”¹⁷⁹ Despite this tremendous impact, the industry does not have to abide by point source regulations following a 1987 exemption granted by Congress.¹⁸⁰ This is a problem that will continue until nonpoint sources are forced to take responsibility for their pollution and foot the bill—a stark challenge for EPA and the states. TMDLs are not the only solution, but they have the potential to play a significant role, as the Yakima River TMDL story demonstrates.

The agricultural industry complains that the economic burdens placed on it to meet stringent TMDLs are too great. This argument fails, however, when one compares the overall burden to control water pollution among all industries. “The marginal costs of pollution reduction for nonpoint sources [such as agriculture] might be well below those that [point source] permittees would bear to achieve the same reductions in pollutant loads.”¹⁸¹ Multiple best available technologies (BATs) exist for agriculture and are significantly less complex and less costly than other industry controls.¹⁸² Examples include shelterbelts that reduce wind and soil erosion, cover crops that also reduce soil erosion and excess nutrient leaching, and cattle fences that keep cattle and their waste away from fragile waterways.¹⁸³ Policymakers and lawmakers should consider a combination of policy tools to achieve pollution reduction goals through TMDL implementation. Such tools might include a tax on agricultural chemicals to generate funding to subsidize the transition from conventional to organic agriculture, or low interest loans that fund the purchase of pollution control technologies.¹⁸⁴

A TMDL program free of loopholes could begin to establish equity in water pollution regulation by forcing the agricultural sector to account for its portion of the problem. The limited ability of scientists to pinpoint the pollution sources in agricultural areas makes this task difficult.¹⁸⁵ Still,

179. *Id.*

180. 33 U.S.C. § 1362(14) (2006).

181. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 302–05 (2000).

182. Houck, *supra* note 35.

183. *Id.*

184. See Ruhl, *supra* note 181, at 302–05; see also GARY WOLFF, PACIFIC INSTITUTE, INVESTING IN CLEAN AGRICULTURE: HOW CALIFORNIA CAN STRENGTHEN AGRICULTURE, REDUCE POLLUTION, AND SAVE MONEY (Jan. 2005), available at http://www.pacinst.org/reports/clean_ag/investing_in_clean_agriculture.pdf. “The [‘Investing in Clean Agriculture’] report estimates that the voluntary program and fee increase could bring \$60 million per year into the agricultural sector while also bringing the most cutting edge research on sustainable farming techniques to those in the field.” Pacific Institute, “Win-Win” Plan Rewards Clean Farmers, Reduces Pesticide Use (Feb. 8, 2005), http://www.pacinst.org/reports/clean_ag/index.htm (last visited Sept. 2, 2007).

185. Telephone interview with Vladimir Novotny, *supra* note 145. Professor Novotny explains that engineers can confidently analyze a waterway and trace pollutants back to a

the widespread impact of agriculture on water quality demands action. *Friends of the Earth* provides something for Congress to rally around and build upon. Lawmakers should address the problematic issue of the inequitable under-enforcement of TMDLs. Congress should also encourage an honest implementation of “daily” in the context of TMDLs instead of allowing EPA to move water pollution regulation backward as the agency seems intent on doing following *Friends of the Earth*.¹⁸⁶

IV. AFTERMATH OF *FRIENDS OF THE EARTH*

One week after the *Friends of the Earth* decision, EPA responded by issuing a memorandum finding that annual TMDLs are no different from daily TMDLs, with the “daily” limit possibly being less stringent.¹⁸⁷ Recently, EPA clarified its stance on the meaning of “daily” in a memo to all its regional directors.¹⁸⁸ The memorandum defines the agency’s position on the meaning of “daily” in “total maximum daily loads” and the implications for pollution permits from point sources.¹⁸⁹ Following the uncertainty created by the Circuit split,

EPA recommends that all TMDLs and associated load allocations be expressed in terms of daily time increments. In addition, TMDL submissions may include alternative, non-daily pollutant load expressions in order to facilitate implementation of the applicable water quality standards. . . . Because water quality standards are expressed in a variety of ways and because pollutants and water bodies have different characteristics, EPA believes that there is some flexibility in how daily increments may be expressed.¹⁹⁰

Further, in interpreting the *Friends of the Earth* decision’s impact on pollution permits, EPA directs that “expressing a TMDL as a daily load does not interfere with a permit writer’s authority under the regulations to translate that daily load into the appropriate permit limitation, which in turn could be expressed as an hourly, weekly, monthly, or other measure.”¹⁹¹

specific industrial plant, yet the same investigation would not yield dependable results in an agricultural area, making the regulation of nonpoint sources significantly more challenging. *Id.*

186. For details on EPA’s actions following *Friends of the Earth*, see *infra* Part IV.

187. *EPA Official Says Daily TMDL Limit Unlikely to Exceed Annual Seasonal Limit*, 37 *Env’t Rep.* (BNA) 960 (May 5, 2006).

188. Memorandum from Benjamin H. Grumbles, *supra* note 13; see also *Memo Clarifying EPA’s Position on the Use of Daily Time Increment When Establishing Total Maximum Daily Loads for Pollutants*, *supra* note 13. The Fax cover sheet for the internal EPA Memorandum from Francoise Brasier on TMDL policy in reaction to the *Friends of the Earth* decision says “URGENT. Anacostia Memo. Needs to be signed today [11/15/06] so it can be properly referenced in the brief to be filed with Supreme Court.” *Id.* (on file with author).

189. Memorandum from Benjamin H. Grumbles, *supra* note 13.

190. *Id.*

191. *Id.*

On November 22, 2006, EPA filed a brief with the U.S. Supreme Court requesting the Court to reject WASA's petition for a writ of certiorari. EPA contended, "its recent nationwide guidance [the memorandum described above] provides enough flexibility to state permitting agencies and to clean water permit holders to apply a daily limit for total maximum daily loads (TMDLs) in impaired lakes, streams, and rivers," as ordered by the D.C. Circuit in *Friends of the Earth*.¹⁹² EPA argued that *Friends of the Earth* "does not warrant" judicial review because the D.C. Circuit opinion "will only have limited effect because it is controlling law only in the District of Columbia."¹⁹³ EPA further sought to convince the Court that the agency's "nationwide guidance for expressing TMDLs as daily loads clears up any ambiguity on how to apply daily discharge limits."¹⁹⁴ In its brief, EPA argued the current circuit split on the meaning of "daily" "will only have limited prospective effect" because the agency's guidance directs all permitting agencies to draft TMDLs consistent with the D.C. Circuit, but in a way that accounts for seasonal variations.¹⁹⁵ The Supreme Court denied the WASA petition on January 16, 2007.¹⁹⁶

EPA's stance and the Supreme Court's refusal to hear the *Friends of the Earth* appeal will only lead to further litigation by environmental groups and others seeking to clarify the meaning of "daily" in other circuits. Alexandra Dunn, the National Association of Clean Water Agencies' (NACWA) general counsel, disagrees with EPA that the guidance should resolve the legal uncertainties arising from the appellate court decisions. NACWA will therefore consider petitioning EPA to promulgate rules clarifying the meaning of "daily."¹⁹⁷

A. *EPA's New TMDL Interpretation—What is it AND Is it Good for the Environment?*

EPA's new interpretation of "daily" following *Friends of the Earth* applies an every day standard, while also including a safety valve for pollution surges expected during major storm events. This policy caters to *Friends of the Earth* by mentioning "daily," but in effect compartmentalizes the rigid ruling to allow for EPA's preferred regulatory approach of flexible TMDLs based on any time standard that the agency finds appropriate. Such flexibility may prove harmful to the

192. Saiyid, *supra* note 11.

193. *Id.*

194. *Id.*

195. *Id.*

196. D.C. Water & Sewer Auth. v. Friends of the Earth, 127 S. Ct. 1121 (2007).

197. Saiyid, *supra* note 11.

environment if the permit writer is not strict in setting TMDL standards. For example, one possible interpretation of EPA's new "daily" standard would allow EPA to permit 1,000 gallons of raw sewage per day except during major storm events, when the daily permitted load is 100,000,000 gallons of raw sewage.¹⁹⁸ EPA could also write the permit to allow "up to 3,000 gallons of sewage per day, provided that the total load for any one year does not exceed 100,000 gallons of sewage."¹⁹⁹ On its face, such a standard complies with *Friends of the Earth*. Looking deeper, the EPA standard potentially allows nonpoint sources, like agriculture and stormwater runoff, to remain largely unregulated, while point sources, such as the sanitation system polluting Washington, D.C.'s Anacostia River, could potentially dump over a billion gallons of raw sewage into the river each year and do so legally.

EPA's new interpretation demonstrates the limits of the judicial branch and the power of agency discretion. Regardless of the interpretation of "daily," it is now apparent that a rigid, daily standard is no better at containing the agency's power than the flexible standard that EPA prefers. If EPA does not want to set standards strictly, it is not required to do so, as long as it obeys the CWA by setting some standard. If water quality standards are weak or exemptions for specific industries are granted (as they have been for agriculture in the past), then the law is not broken—but the environment still suffers. The loopholes in EPA's interpretation of TMDLs demands congressional intervention to ensure that the CWA stays on track to achieve cleaner water throughout the country and not just where industry finds compliance convenient.

B. Will EPA's New Interpretation of "Daily" Survive Judicial Review?

Given that EPA's revised interpretation of "daily" seems to contain similar loopholes for polluters as the agency's prior interpretation challenged in the *Friends of the Earth* litigation, the new policy will likely be challenged in court by environmental groups who find that EPA has only incorporated the form but not the function of the D.C. Circuit's ruling. EPA will likely counter that it is entitled to deference under *Chevron*, and that it has sufficiently incorporated the *Friends of the Earth* decision into its revised TMDL policy. The question then becomes whether EPA's new interpretation will survive judicial review. The answer is unclear given the largely subjective nature of legislative interpretation under *Chevron* particularly evident in the current circuit split. Even with such subjectivity inherent in *Chevron* analysis, there is a

198. E-mail from Dan Farber, Professor, University of California, Berkeley, School of Law (Boalt Hall), to author (Dec. 15, 2006) (interpreting EPA's policy) (on file with author).

199. *Id.*

greater likelihood a court will find a way to reach *Chevron* step two to allow deference to EPA's new interpretation of "daily." Because EPA has incorporated the form of the *Friends of the Earth* decision into its new TMDL policy, a court will likely rule EPA has done so reasonably. Under *Chevron*, courts will likely be reluctant to tell EPA how it should have incorporated the D.C. Circuit decision into its policy and will instead defer to EPA, so long as the court agrees that EPA's interpretation was reasonable.²⁰⁰

CONCLUSION

Three decades after the passage of the modern Clean Water Act, the time has come to take stock of what this landmark statute has accomplished and what new avenues regulators should explore. In its relatively short history, the CWA has improved the health of the nation's waterways, and pollution has been greatly reduced in various industries.²⁰¹ Rivers no longer catch fire and many cities have addressed sanitation problems. Still, water pollution remains a serious issue. The putrid smell of the Anacostia River demonstrates the continuing importance of this issue.²⁰² The *Friends of the Earth* decision provides the opportunity to refocus on TMDLs, a recently discovered tool embedded within the CWA with the power to stop that smell. Restoring the plain meaning of "daily" to TMDLs should be the first step in making this tool an effective one.

In the absence of action by the Supreme Court, policymakers must act to strengthen TMDLs as a pollution-reduction tool. With accurate accounting, this program can be more effective at achieving its pollution abatement goals. EPA can begin to better promote the interests of the environment by honestly applying the D.C. Circuit's plain meaning interpretation of "daily" from *Friends of the Earth* and not allow loopholes to permeate a potentially strong water regulation tool. If EPA fails to take such action, then Congress must step in and force EPA to do so. Such honest accounting of the nation's pollution budget provides a direct path toward achieving the CWA's ultimate goal of providing more "fishable, swimmable" waters in the United States—water that should be clean every day, not just seasonally or annually.

200. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

201. See, e.g., William L. Andreen, *Water Quality Today—Has the Clean Water Act Been A Success?*, 55 ALA. L. REV. 537, 542 (2004) (concluding that "the CWA, in fact, has been remarkably successful in doing what it was designed to do").

202. See Faber, *supra* note 67, (describing how one can smell the stink of the Anacostia River from the Nationals' baseball stadium).