Friends of the Earth, Inc. v. EPA: The Daily Plunge into Troubled Waters

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FRIENDS OF THE EARTH, INC. V. EPA: THE DAILY PLUNGE INTO TROUBLED WATERS

I. Introduction

The contemporary history of America's water quality is troubling. In the Nation's recent past, "the Potomac River was too polluted for swimming . . . and the Cuyahoga River had burst into flames." Several of our Nation's bodies of water were so polluted they were unsuitable for drinking and recreation; the polluted bodies of water were hardly cleaner than open sewers. In response to this crisis, Congress enacted the Clean Water Act (CWA) to improve the state of polluted bodies of water across the Nation. The CWA requires each state to establish Total Maximum Daily Loads (TMDLs) of pollutants permissible to be discharged into each troubled body of water and submit the established TMDLs to the Environmental Protection Agency (EPA) for approval. Even after the CWA was enacted, many of the Nation's waters remain highly polluted and unsafe for aquatic life and recreational use. Thus far the EPA has approved effluent loads for daily, annual, and seasonal time periods in several states across the nation. The EPA's various approvals led to two major lawsuits challenging the EPA's authority to approve maximum loads for time periods other than loads per day, such as maximum loads per year or season. In

2. See id. (describing level of pollution existing before enactment of Clean Water Act).
7. See Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 142 (D.C. Cir. 2006) (questioning meaning of daily as used in CWA); Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 93 (2d Cir. 2001) (questioning EPA's authority to approve pollutant loads for various time periods under CWA).

(123)
each case involving the interpretation of the word “daily” within the CWA, the courts analyzed statutory language and legislative intent to reach their respective holdings. Each court formed different interpretations, despite applying the same analytical framework to the same statutory language. In 2001, the Court of Appeals for the Second Circuit held the EPA has authority to approve maximum loads for various time periods and is not restricted solely to approval of daily loads. Conversely, in *Friends of the Earth, Inc. v. EPA (Friends of the Earth)*, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held the EPA does not have authority to approve loads for any period of time other than a maximum amount per day. This circuit split has the potential to affect bodies of water in every state of the Nation.

This Note focuses on whether the D.C. Circuit employed the proper analytical framework when interpreting the CWA. Section II provides a brief summary of the facts of *Friends of the Earth*. Section III develops the legal background that gave rise to the CWA and relevant case law, focusing on both the Second Circuit’s interpretation of the CWA and the proper method courts should follow in interpreting statutes. Section IV describes the D.C. Circuit’s approach to analyzing the CWA and the actions taken by the EPA. Section V provides a critical analysis of the D.C. Circuit’s approach to interpreting the CWA and raises issues the court may have over-

8. See *Friends of the Earth*, 446 F.3d at 144 (describing D.C. Circuit’s analysis and holding); *Muszynski*, 268 F.3d at 103 (stating Second Circuit’s holding).


10. *Muszynski*, 268 F.3d at 103 (holding CWA does not require loads be established for strictly daily increments and EPA has discretion to approve loads for various non-daily time periods where appropriate).

11. 446 F.3d 140 (D.C. Cir. 2006).

12. See id. (precluding EPA from establishing loads for non-daily time increments to comply with CWA terminology).

13. See generally *Appellate Split*, supra note 6 (discussing impact of *Friends of the Earth* on EPA-approved loads across Nation); see also EPA, supra note 6 (listing EPA-approved TMDLs in each state).

14. For a discussion of the facts of *Friends of the Earth*, see infra notes 19-32 and accompanying text.


16. For a further discussion of the D.C. Circuit’s analysis, see infra notes 84-103 and accompanying text.
looked in its analysis. Finally, Section VI discusses how *Friends of the Earth* will affect future interpretations of the CWA, as well as the potential impact the decision will have as other jurisdictions decide how to implement the CWA and establish TMDLs.

II. FACTS

The Anacostia River, which flows from Maryland through Washington, D.C., is one of the ten most polluted rivers in the United States. Due to its sub-standard oxygen levels and excessive turbidity, the Anacostia River did not meet water quality standards set forth in the CWA. In an attempt to decrease the Anacostia’s pollution and guide it toward meeting water quality standards, the EPA approved two TMDLs: one limiting the annual discharge of oxygen-depleting pollutants and another limiting the seasonal discharge of pollutants contributing to turbidity. Based on the nature of the pollutants in the Anacostia, the District of Columbia measured the loads of oxygen-depleting pollutants in years and turbidity pollutants in seasons; the District of Columbia then submitted both the annual and seasonal load proposals to the EPA for approval. The EPA approved both TMDLs, although neither limited daily pollutant discharge.

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17. For a critical analysis of the D.C. Circuit’s decision, see infra notes 104-38 and accompanying text.
18. For a further discussion of the impact of the D.C. Circuit’s decision, see infra notes 139-58 and accompanying text.
20. *See Friends of the Earth, 446 F.3d at 143* (listing reasons Anacostia River failed to meet water quality standards). The Anacostia’s low oxygen level is due to biochemical pollutants that consume the oxygen. *Id.* Low oxygen results in risk of suffocation for aquatic life. *Id.* High turbidity, characterized by murkiness, stunts the growth of plants that rely on sunlight and impair recreational use. *Id.*
21. *See id.* (describing EPA’s role in approving loads for various time periods, ultimately giving rise to present lawsuit). Turbidity refers to the level of murkiness in the water and is measured by the number of particles suspended in the water. B.H. Munson et al., Water on the Web, http://waterontheweb.org/under/water-quality/turbidity.html (last visited Oct. 27, 2007) (explaining concept of turbidity and its detrimental impact on water quality). A high level of murkiness is a characteristic of poor water quality and may negatively impact aquatic life. *Id.*
23. *See Friends of the Earth, 446 F.3d at 143* (questioning whether *daily* should be ascribed literal definition).
Consequently, Friends of the Earth, Inc. sued the EPA, asserting the CWA requires limitations on daily pollutant discharge but does not provide for limitations on annual or seasonal discharge. The EPA responded that, in enacting provisions for TDMLs of permissible pollutants, Congress intended to provide the EPA with discretion to establish annual and seasonal maximum loads in order to aid bodies of water in meeting water quality standards. The EPA contended the “daily” provision should not be strictly construed, because bodies of water can occasionally “tolerate large one-day discharges of certain pollutants” without compromising compliance with water quality standards. The EPA claimed Congress would have included additional language to convey the strict requirement if Congress had meant “daily” in a literal sense. Furthermore, the EPA argued a literal interpretation of the term “daily” would be absurd, because there are times when the regulation would be less effective if the EPA were to be held to such a strict requirement.

The D.C. District Court granted the EPA’s motion for summary judgment and held there was no clear evidence Congress intended the EPA to calculate only daily pollutant load limits under the CWA. Further, the district court found the EPA reasonably determined the issuance of non-daily permits would meet daily water quality standards. The district court also concluded the EPA’s approval of annual and seasonal maximum loads was not arbitrary or capricious. On appeal, the D.C. Circuit reversed the district court’s judgment and adopted a literal interpretation of “daily,” which excluded annual or seasonal loads.

24. See id. (explaining Friends of the Earth’s grounds for lawsuit). The EPA filed suit in the United States Court of Appeals for the D.C. Circuit, which transferred the case to the District Court for the District of Columbia based on lack of subject matter jurisdiction. Id.

25. See id. at 142 (stating EPA’s argument on appeal).

26. Id. at 145 (stating purpose of maximum daily load remains intact despite broader interpretation of daily term).

27. See id. at 144 (describing EPA’s contention during oral argument that Congress should have been clearer if it intended daily to be interpreted literally).

28. See Friends of the Earth, 446 F.3d at 146 (describing EPA’s final attempt to demonstrate Congress could not have intended daily to be read literally).

29. Id. at 143-44 (stating holding of District Court for District of Columbia in favor of EPA).

30. Id. at 144 (stating holding of District Court for District of Columbia in agreement with EPA’s actions preceding lawsuit); accord Friends of the Earth, 346 F. Supp. 2d at 185.

31. Friends of the Earth, 446 F.3d at 144 (stating final district court determination in favor of EPA’s argument); accord Friends of the Earth, 346 F. Supp. 2d at 185.

32. See Friends of the Earth, 446 F.3d at 148 (reversing District Court for District of Columbia and vacating EPA’s approvals of annual and seasonal pollutant loads).
III. BACKGROUND

A. Legislative Framework

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Under the CWA, each state must identify waters within its borders that are otherwise not subject to any water quality standards, because Congress's required effluent limitations are not strict enough to encompass that particular body of water. For the bodies of waters identified,

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\text{[e]ach State shall establish ... the total maximum daily load, for those pollutants which the Administrator identifies ... as suitable for calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.}
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The CWA requires states and the District of Columbia to establish TMDLs for certain pollutants in bodies of water that fail to meet applicable water quality standards. If the EPA approves the proposals, these TMDLs may be incorporated into permits specifying


34. See 33 U.S.C. § 1315(d)(1)(A) (2000) (requiring states to identify bodies of water with poor water quality). Relevant text states: "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quantity standard applicable to such waters." Id. The term "State," by definition, includes the District of Columbia. 33 U.S.C. § 1362(3) (2000). "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into ... waters ... ." 33 U.S.C. § 1362(11) (2000). Water quality standards are defined as:

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\text{[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the [Clean Water] Act.}
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40 C.F.R. § 130.2(d) (2006).


36. See 33 U.S.C. § 1313(d)(2) (2000) (describing relevant provisions of CWA requiring states to establish pollutant loads for bodies of water that do not meet water quality standards); accord Friends of the Earth, 446 F.3d at 143 (describing provisions of CWA upon which present lawsuit is based).
effluent discharges. Ideally, if the pollution loads remain within the amount allotted by the established TMDLs, the body of water should meet water quality standards.

EPA regulations permit TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measure." The EPA stated all pollutants are suitable for calculation of TMDLs under the proper conditions. Nevertheless, the EPA did not perceive the development of TMDLs to be a prerequisite for adoption or enforcement of water quality standards.

B. Chevron Analysis

The Supreme Court established a method of analyzing an agency's construction of a statute in the landmark case, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron). First, a court must determine whether Congress has directly addressed the issue in dispute. If Congress has directly addressed the issue, then the court must defer to Congress's unambiguous, expressed intent. If, however, Congress has not clearly and directly addressed the issue, then the court must determine whether the agency's construction of the statute is permissible. In analyzing whether an agency's construction is permissible, the court must give considerable weight to the agency's construction, provided the

38. See Friends of the Earth, 446 F.3d at 143 (stating anticipated result of compliance with established TMDLs). "Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C) (2000).
41. Total Maximum Daily Loads Under Clean Water Act Notice, 43 Fed. Reg. 60,664 (Dec. 28, 1978). The EPA did not consider the establishment of TMDLs a high priority because the practical results of TMDLs, namely the improvement of water quality, were being achieved through state water quality management. Id.
43. Id. at 842 (establishing analytical framework to be employed by court).
44. Id. at 842-43 (explaining first step of analysis for agency construction of statutes is based on statutory language).
45. Id. at 843 (describing process for reviewing agency interpretation of statute where Congress has been silent on issue and instructing court not to impose its own interpretation of statute).
agency's construction was not "arbitrary, capricious, or manifestly contrary to the statute."46 The *Chevron* Court analyzed statutory language, legislative history, and policy supporting the Clean Air Act (CAA) and held the EPA's regulation was a reasonable interpretation of the statute.47

In *Sierra Club v. EPA*,48 the Sierra Club petitioned the D.C. Circuit for review based on the contention that the EPA lacked authority to approve revisions to state implementation plans for ozone standards.49 Under the CAA, the EPA has authority to approve implementation plans devised by states to meet air quality standards.50 The D.C. Circuit found the EPA exceeded its authority in approving revised state implementation plans, noting the EPA's decision to approve the plans was arbitrary and capricious.51

In reaching its holding, the D.C. Circuit analyzed the CAA and the EPA's actions, applying the standards set forth in *Chevron*.52 The D.C. Circuit found Congress deliberately included certain exemptions from the CAA and did not intend for unlisted exemptions

46. *Id.* at 844 (describing presumption in favor of agency statutory construction). "When a challenge to an agency construction of a statutory provision... centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail... [F]ederal judges... have a duty to respect legitimate policy choices made by those who [have constituency]." *Id.* at 866; see also 5 U.S.C. § 706(2)(A) (2000). “[T]he reviewing court shall... set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...” *Id.*

47. See *Chevron*, 467 U.S. at 844 (analyzing whether EPA regulation was reasonable construction of Clean Air Act). “[T]he meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea.” *Id.* at 861 (describing statutory language analysis). In analyzing the legislative history of a statute, the court analyzes Congress's purpose and motivation for enacting the statute. *See id.* at 863.

48. 294 F.3d 155 (D.C. Cir. 2002).

49. *See id.* at 158 (stating issue on appeal). In the process of approving states' implementation plans, the EPA concluded contingency measures were not a mandatory element of the revised implementation plans. *See id.* at 159 (describing EPA's actions outside bounds of its role under Clean Air Act to approve state-submitted implementation plans).

50. *See id.* at 158 (describing roles of states and EPA in Clean Air Act).

51. *Id.* (finding in favor of Sierra Club and holding EPA exceeded its authority in approving states' revised implementation plans).

52. *Id.* at 160 (describing *Chevron* analytical framework employed to determine whether EPA's actions exceeded CAA provisions). “The most reliable guide to congressional intent is the legislation the Congress enacted....” *Id.* at 161 (responding to EPA's argument encouraging court to interpret CAA to give effect to broader congressional intent).
to apply.\textsuperscript{53} Nevertheless, the court acknowledged there are rare instances when it will look beyond a literal reading of statutory language, such as where the application of a statute leads to results contrary to the drafters' intent.\textsuperscript{54} The court stated, "[a]n agency may not disregard ‘the [c]ongressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.’"\textsuperscript{55}

Similarly, in \textit{New York v. EPA},\textsuperscript{56} the D.C. Circuit vacated the Equipment Replacement Provision (ERP) promulgated by the EPA because it was contrary to the plain language of the CAA.\textsuperscript{57} The court applied the \textit{Chevron} test to determine whether the use of the word "any" in the statute was ambiguous.\textsuperscript{58} In its analysis, the court noted, "the sort of ambiguity giving rise to \textit{Chevron} deference ‘is a creature not of definitional possibilities, but of statutory context.’"\textsuperscript{59} The court determined that where Congress specifically addressed the issue, the meaning or ambiguity of certain statutory words or phrases must be analyzed in light of their context and not in isolation.\textsuperscript{60} Courts must give effect to each word uttered within the context of the particular statute.\textsuperscript{61}

In \textit{Engine Manufacturers Association v. United States EPA (Engine Manufacturers)},\textsuperscript{62} the Engine Manufacturers Association (EMA) dis-
agreed with the EPA’s interpretation of “new” as used in the CAA. 63 Accordingly, the D.C. Circuit applied the Chevron analysis. 64 Both the EMA and the EPA set forth valid arguments for definitions of “new;” therefore, the court held the absence of a definition of “new” in the section of the CAA at issue did not satisfy the first step of the Chevron analysis. 65

The decision in Engine Manufacturers is significant because it provides further insight into the application of Chevron. 66 In terms of statutory construction, the court noted, “[t]he most traditional tool . . . is to read the text; if it clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is ‘silent’ in the Chevron sense.” 67 Plain meaning of statutory language is conclusive unless the drafters’ purpose was clearly contrary to the language used. 68 In this regard, the court may use legislative intent as a tool to interpret statutory language only if the plain meaning of the statute produces a result at odds with the drafters’ intent. 69 The court may not depart from the plain meaning of the statute unless there is sufficient evidence Congress intended to warrant such a reading. 70

In Engine Manufacturers, the D.C. Circuit emphasized it is not the courts’ role to either improve a statute, as to better serve con-

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63. Id. at 1082 (discussing background of case). The EPA adopted a “showroom-new” definition of the term “new” as used in the CAA rather than a date-certain definition. Id. The EPA’s “showroom-new” definition was consistent with the statutory definition of new in other sections of the CAA. Id.

64. See id. at 1084 (describing Chevron analysis used to interpret new in CAA).

65. See id. at 1085 (finding step one of Chevron analysis not satisfied because Congress did not specifically provide definition for phrase new nonroad engine). The EMA argued Congress would have included the definition of “new” if it had intended to have the definition from another section of the CAA to apply. See id. The EPA argued the exact opposite: if Congress meant to apply a different definition to the term, it would have included one in the statute. See id. Although the EMA pointed to evidence indicating Congress’s intent, it is commonly accepted that “post-enactment statements cannot be used to change [c]ongressional intent that is not announced at the time of enactment.” Id. at 1087. “At best, [post-enactment statements] are statements that the EPA could take into account in deciding on a reasonable interpretation of the statute . . . .” Id.

66. See id. at 1088 (describing Chevron process of determining congressional intent).

67. Engine Mfrs. Ass’n, 88 F.3d at 1088 (internal citations omitted) (describing nuances of Chevron analysis to determine congressional intent).

68. Id. (describing limitations on plain language statutory interpretation).

69. See id. (explaining rare circumstance warranting consideration of legislative intent to interpret plain language of statute).

70. See id. at 1088-89 (demonstrating strict threshold before court may consider legislative intent). The court cannot ignore the statutory text even if the court does not agree with it or believes it is a product of congressional oversight. Id.
gressional purpose, or to ignore congressional intent by claiming the court's approach would be a better policy.\(^{71}\) "[T]o avoid a literal interpretation at *Chevron* step one, [the EPA] 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."\(^{72}\)

Judge Tatel of the D.C. Circuit disagreed with the majority's explanation of how to move beyond the first step of *Chevron*.\(^{73}\) In a partial dissent, Judge Tatel emphasized the court should "look to the provisions of the whole law, and to its object and policy[,]" rather than focusing entirely on statutory language.\(^{74}\) Judge Tatel argued the court may depart from literal statutory meaning if compliance with plain language would produce a result at odds with congressional intent or, in contrast to the majority, if the result of a literal statutory interpretation would be unreasonable and at odds with legislative policy as a whole.\(^{75}\)

In *Natural Resources Defense Council, Inc. v. Muszynski (Muszynski)*,\(^{76}\) various environmental groups sued the EPA, alleging the EPA's approval of annual phosphorus TMDLs for New York reservoirs violated the CWA.\(^{77}\) Natural Resources, an environmental group, claimed EPA-approved annual TMDLs violated the plain language of the CWA.\(^{78}\) The EPA, on the other hand, asserted: (1) the CWA was silent as to how TMDLs should be expressed; and (2) the EPA's regulations provided for TMDLs to be expressed as mass

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\(^{71}\) See id. at 1089 (emphasizing court's limited ability to interpret statutes outside terms set forth by Congress).

\(^{72}\) Engine Mfrs. Ass'n, 88 F.3d at 1089 (describing how to avoid literal statutory interpretation in first step of *Chevron* analysis). "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." Id. at 1092 (internal citations omitted).

\(^{73}\) See id. at 1100 (Tatel, J., dissenting in part and concurring in part) (describing disagreement with majority’s analysis of first step of *Chevron*). Interestingly, Judge Tatel authored the *Friends of the Earth* opinion for the D.C. Circuit. See generally *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

\(^{74}\) Engine Mfrs. Ass'n, 88 F.3d at 1100 (Tatel, J., dissenting in part and concurring in part) (internal citations omitted) (disagreeing with majority's application of *Chevron* and describing alternative approach to first step of *Chevron* analysis).

\(^{75}\) See id. (Tatel, J., dissenting in part and concurring in part) (internal citations omitted) (describing low threshold for determining when it is appropriate for court to look beyond plain language and consider policy and object of statute in first step of *Chevron*).

\(^{76}\) 268 F.3d 91 (2d Cir. 2001).

\(^{77}\) Id. at 95-96 (describing amended complaint alleging EPA's approval of TMDLs submitted by New York violated EPA's nondiscretionary CWA duty).

\(^{78}\) Id. at 97 (claiming EPA only has authority to approve daily loads and not annual loads approved here).
per unit of time. The Second Circuit sided with the EPA and held the CWA does not require all TMDLs to be expressed solely in terms of maximum loads per day. The Second Circuit also concluded the EPA has discretion to approve TMDLs for time periods other than loads per day. In its statutory analysis, the Second Circuit interpreted the TMDL provision broadly and found a narrow interpretation overlooked the statute’s purpose. Accordingly, the Second Circuit affirmed the district court’s decision and held if a TMDL effectively regulates pollution in bodies of water, it may be expressed by any measure of mass per unit of time.

IV. NARRATIVE ANALYSIS

In *Friends of the Earth*, the D.C. Circuit addressed whether the word “daily,” as used in the CWA, limited the EPA in establishing pollutant loads on a daily basis or whether it allowed the EPA to address other time periods. In performing a *Chevron* analysis, the D.C. Circuit examined: (1) the plain language of the CWA; (2) the CWA’s legislative history; and (3) the policy supporting the CWA. Following the *Chevron* analysis, the court concluded the term “daily” is unambiguous and adopted the term’s literal meaning. The

79. Id. (defending its approval of annual loads as permissible under CWA).
80. See id. at 103 (explaining how EPA-approved loads further purpose of CWA by improving water quality to meet applicable standards).
81. Muszynski, 268 F.3d at 103 (noting EPA’s discretion to approve TMDLs for various periods of time).
82. See id. at 98 (describing plain language analysis employed to interpret terms of CWA within context of entire statute). The Second Circuit did not believe Congress intended pollutant regulation to be so narrowly confined to regulate pollutants strictly on a daily basis. See id. at 99. “Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one.” Id.
83. See id. at 99 (interpreting daily broadly within context of entire statute and in light of statute’s purpose to improve water quality). The district court stated so long as an agency’s regulation does not contradict a statute’s plain language, the agency has reasonable authority to promulgate reasonable regulations which coincide with the statute’s purpose. See id. at 96 (citing *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 555 (S.D.N.Y. 2000)). The United States District Court for the Southern District of New York found, based on the nature of pollutants, the non-daily TMDLs were optimal and the EPA’s approval of the TMDLs were reasonable in the particular circumstances. Id.
84. See *Friends of the Earth*, 446 F.3d 140, 142 (D.C. Cir. 2006) (setting forth issues on appeal as to whether CWA precludes EPA from approving pollutant loads for annual or seasonal time periods and whether EPA improperly approved such loads for Anacostia River).
85. Id. at 144-47 (describing *Chevron* analysis applied by D.C. Circuit).
86. See id. at 144-48 (analyzing EPA interpretation of TMDL within context of *Chevron* and determining EPA improperly approved annual and seasonal pollutant loads).
D.C. Circuit Court overturned the D.C. District Court's decision and held the use of the term "daily" precluded the EPA from establishing pollutant loads for any time period other than loads per day.\(^{87}\) In its decision, the D.C. Circuit Court stated, "the parties may move to stay the district court's order on remand to give either the District of Columbia a reasonable opportunity to establish daily load limits or [the] EPA a chance to amend its regulation declaring 'all pollutants . . . suitable' for daily loads."\(^{88}\)

A. Plain Language of the Statute

The D.C. Circuit analyzed the plain language of the CWA within the *Chevron* analytical framework.\(^{89}\) The CWA provides "[e]ach state shall establish . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation."\(^{90}\) Because the EPA identified every pollutant as suitable for calculation of TMDLs, the D.C. Circuit found the CWA requires the District of Columbia to establish a TMDL for every pollutant in the Anacostia River.\(^{91}\)

The court found no ambiguity in the use of the specific phrase "total maximum daily loads" and reiterated that the court has never required Congress to include extraneous words.\(^{92}\) According to the court, if Congress intended the EPA to establish annual and seasonal loads in addition to total maximum daily loads, then Congress would have included the necessary language in the provision.\(^{93}\) Furthermore, Congress could have used the language "total maximum loads," excluding a specific time period from the provision.\(^{94}\)

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87. *See id.* at 142 (finding *daily* unambiguous and interpreting term narrowly to preclude EPA-approval of pollutant loads for time periods other than loads per day).

88. *Id.* at 148 (internal citations omitted) (suggesting plan of action in recognition of parties' common goal to improve water quality of Anacostia River).

89. *See Friends of the Earth,* 446 F.3d at 144 (setting forth *Chevron* analysis used to determine whether EPA acted properly within CWA).


91. *See Friends of the Earth,* 446 F.3d at 144 (analyzing plain language of CWA under *Chevron*). In identifying pollutants suitable for the calculation of total maximum daily loads, the EPA stated all pollutants are suitable for calculation under proper technical conditions. Total Maximum Daily Loads Under Clean Water Act Notice, 43 Fed. Reg. 60,665 (Dec. 28, 1978).

92. *See Friends of the Earth,* 446 F.3d at 144 (discussing clarity of language in CWA and refuting EPA's argument on how language could be even clearer).

93. *See id.* (portraying congressional intent through analysis of statutory language).

94. *See id.* (explaining Congress's alternative in leaving temporal element of total maximum loads open to interpretation).
Instead, it specified a daily time period and, thus, left no time gap for the EPA to fill.\footnote{See id. (discussing Congress’s language choice in CWA provisions).}

B. Legislative History and Policy

The D.C. Circuit Court emphasized “[t]he most reliable guide to congressional intent is the legislation Congress enacted . . . .”\footnote{Id. (stating burden for absurdity and distinguishing instant case from Second Circuit decision in \textit{Natural Res. Def. Council, Inc. v. Muszynski}, 268 F.3d 91 (2d Cir. 2001)). In \textit{Muszynski}, “the Second Circuit held that reading ‘daily’ to mean daily would be ‘absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one.’” Id. (internal citations omitted).} The court noted agencies have an “exceptionally high burden” in proving the absurdity of legislation in the D.C. Circuit.\footnote{Id. at 145-46 (stating EPA failed to meet its burden to show requirement of daily loads for certain pollutants was illogical).} In response to the EPA’s argument that Congress established the maximum load provision in the CWA to promote compliance with water quality standards, the D.C. Circuit Court ruled the establishment of maximum daily loads does not hinder this policy.\footnote{See \textit{Friends of the Earth}, 446 F.3d at 145 (overcoming EPA’s argument and demonstrating bodies of water that may be able to tolerate large one-day discharges of certain pollutants is not reason to find literal interpretation of CWA conflicts with overall congressional intent to improve water quality).} The court found the EPA failed to prove the establishment of maximum daily loads was illogical.\footnote{See id. at 145-46 (stating EPA failed to meet its burden to show requirement of daily loads for certain pollutants was illogical).} As a result, the court was unable to agree with the EPA’s argument that Congress could not have intended to “require daily loads” as it was written.\footnote{Id. at 146 (refuting EPA’s argument that Congress could not have intended to require solely daily loads.)}

The D.C. Circuit Court held even if an agency believes the language in a statute leads to undesirable consequences in some circumstances, the court cannot dismiss the statute’s plain language.\footnote{Id. at 145-46 (stating court does not have power to disregard legislation as it is written).} Suggesting the EPA address its arguments to Congress, the court asserted the “EPA may not ‘avoid the [c]ongressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.’”\footnote{Id. (quoting \textit{Engine Mfrs. Ass’n v. U.S. EPA}, 88 F.3d 1075, 1089 (D.C. Cir. 1996)) (suggesting EPA should bring its argument to Congress if it seeks changes in CWA language).} Because Congress specified a daily time period in the CWA and it is
the role of Congress, not the judiciary, to consider desired policy changes in the provision, the court declined to allow the EPA to set annual or seasonal maximum loads.103

V. CRITICAL ANALYSIS

In Friends of the Earth, although the D.C. Circuit properly assigned a literal interpretation to the word “daily” as used within the CWA, the court’s analysis does not address underlying issues that could impact the court’s interpretation.104 By interpreting the word “daily” literally, the D.C. Circuit rejected the district court’s findings that the term was ambiguous and that the CWA did not manifest a congressional intent requiring the EPA to calculate only daily pollutant loads.105 By applying a literal interpretation of “daily,” the D.C. Circuit also rejected the Second Circuit’s holding in Muszynski that based on congressional intent such a literal interpretation of “daily” was absurd.106

The D.C. Circuit resolved the first step of the Chevron analysis by concluding Congress specifically addressed the time period in prescribing TMDLs.107 The court referenced the dictionary definition of “daily” and found no ambiguity in the term as used in the CWA.108 Under the Chevron analysis, if a court finds Congress directly addressed an issue and there is no ambiguity, then that court must defer to the statutory provision unless the provision is absurd or contrary to congressional intent.109

103. See Friends of the Earth, 446 F.3d at 145 (describing Court’s limited role to address policy concerns). If daily maximum loads were inappropriate for some pollutants and the establishment of daily loads “conflicted with the requirement that TMDLs implement the applicable water quality standards,” the EPA’s argument would be more meritorious. Id. (internal quotations omitted) (describing situation where EPA would have stronger argument).

104. See generally id. (analyzing daily using Chevron analysis and interpreting daily literally).


107. See Friends of the Earth, 446 F.3d at 144 (explaining Congress could have left gap by establishing total maximum loads rather than TMDLs).

108. See id. (defining daily by dictionary definition and common use acceptance in first step of Chevron analysis).

In contrast to the D.C. Circuit’s prior holding in New York v. EPA, which directed courts to look to the context of a statute to determine whether a term is ambiguous, in Friends of the Earth, the court found Congress specifically addressed the time period provision in the CWA and further found the “daily” provision unambiguous based on its dictionary definition. While this definition of “daily” seems to be an unambiguous term, in New York v. EPA, the D.C. Circuit held that it is important to analyze the term within the context of the statute in order to determine ambiguity under Chevron. Furthermore, the D.C. Circuit has previously held deference should be given to the EPA’s construction of the CWA; the CWA “is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments.” In Friends of the Earth, the D.C. Circuit did not delve into the definition of “daily” within its statutory context. Instead, it relied on the dictionary definition of “daily” and stopped its analysis at the plain meaning of the term.

The D.C. Circuit’s analysis in Friends of the Earth overlooked the Supreme Court’s determination “that the [CWA] should be liberally construed . . . to avoid harsh and incongruous results and that the complexity of the [CWA] militates in favor of judicial deference to [the] EPA’s statutory construction.” Under the CWA, each state is required to set forth TMDLs for pollutants and loads, which are set at the “level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge” of the relationship

110. See generally New York v. EPA, 443 F.3d 880, 884 (stating new is ambiguous and court must give effect to context of entire statute to determine meaning of term).

111. See Friends of the Earth, 446 F.3d at 144 (stating daily is unambiguous); New York, 443 F.3d at 884 (finding common term new is ambiguous and describing ambiguity analysis under Chevron) (internal citations omitted).


113. See id. (discussing District of Columbia Water and Sewer Authority’s claim that D.C. Circuit defined daily in isolation).

114. See Friends of the Earth, 446 F.3d at 144 (defining daily as every day per dictionary definition).

between water quality and effluent limitations.116 The definitions provisions in the CWA do not include a definition for “daily” as used within the Water Pollution Prevention Control chapter; however, they do provide definitions for other common terms, such as “pollutant,” “person,” and “[s]tate.”117 The Federal Register’s definition of a TMDL does not include a specific time period, but rather is a general definition based on the purpose for establishing TMDLs.118 Alternatively, the Code of Federal Regulations provides a vague definition of TMDLs in terms of time requirements but does not specifically state pollutant loads must be expressed in terms of amount per day.119 Therefore, although it found no ambiguity within the dictionary definition of “daily,” the D.C. Circuit failed to follow its ruling in New York v. EPA and to consider the context of the term and legislative purpose behind the provision.120

The D.C. Circuit also disagreed with the EPA’s argument that Congress could have been clearer in its expectations if it had stated the TMDL “shall be expressed as a quantity per day or average per day.”121 The court found because Congress used the term “daily” in providing for the establishment of TMDLs, Congress required the effluent loads to be stated as loads per day.122 The D.C. Circuit previously held “courts must give effect to each word of a statute” and, since the term “daily” is expressed in the statute, it cannot be

118. See Total Maximum Daily Loads Under Clean Water Act Notice, 43 Fed. Reg. 60,662 (Dec. 28, 1978) (defining TMDL generally). “A TMDL can generally be defined as the pollutant loading for a segment of water that results in an ambient concentration equal to the numerical concentration limit required for that pollutant by the numerical or narrative criteria in the water quality standards.” Id.
119. See 40 C.F.R. § 130.2(i) (2006) (describing various ways to express pollutant loads within the context of a TMDL). “TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.” Id.
121. Friends of the Earth, 446 F.3d at 144 (rejecting EPA’s argument and finding Congress could not be clearer without including unnecessary extraneous words). “Daily” is defined as “occurring or being made, done, or acted upon every day.” Id. (quoting Webster’s Third New International Dictionary, 570 (1993)) (providing dictionary definition to demonstrate clarity of term). “Daily” may also be defined as “every weekday” or “every day.” Webster’s Third New International Dictionary, 570 (1993) (defining daily and demonstrating potential ambiguity of term).
122. See Friends of the Earth, 446 F.3d at 144 (focusing on Congress’s word choice to determine congressional intent).
Therefore, according to the court, to require that the statute include a phrase that TMDLs must be calculated based on an average amount per day (as suggested by the EPA) would require unwarranted redundancy in the statutory language.124

The term “daily” is not ambiguous as analyzed within the statutory context; therefore, a court cannot advance past the first step of the *Chevron* analysis unless there are additional circumstances that warrant further analysis.125 Nevertheless, a court may analyze legislative intent if enacting the statute as written would contradict congressional intent or produce an absurd outcome.126

The absurdity standard is inherently problematic, however, because the level of absurdity required to disregard statutory language is undefined.127 While the Second Circuit found the strict daily pollutant load requirement absurd when considering the nature of some pollutants, the D.C. Circuit disagreed.128 The D.C. Circuit instead emphasized that a strict daily pollutant load requirement improves water quality and noted that the EPA itself recognized all pollutants were suitable for TMDL calculation.129

Consequently, where there is no absurdity or result contrary to congressional intent, the EPA may be forced to accept a certain position it does not support, because it is bound by the statutory language

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123. *New York v. EPA*, 443 F.3d 880, 885-86 (D.C. Cir. 2006) (internal citations omitted) (describing court’s duties in its analysis of agency’s statutory interpretation). For a further discussion about the analysis in *New York*, see supra notes 56-61 and accompanying text.

124. See *Friends of the Earth*, 446 F.3d at 144 (stating D.C. Circuit never required Congress to use extraneous words).


126. See *Friends of the Earth*, 446 F.3d at 145 (stating EPA’s claim may have carried more weight if enacting plain language of statute led to results which conflicted with purpose of statute); see also *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98-9 (2d Cir. 2001) (holding that maintaining statute as enacted would lead to absurd results).

127. See Nagle, supra note 125, at 1288 (describing issues in determining whether statutory language is absurd).

128. See *Friends of the Earth*, 446 F.3d at 146 (rejecting absurdity argument promulgated in *Muszynski* and finding EPA did not meet high burden of demonstrating Congress could not have intended statutory language as written).

129. See id. (emphasizing weaknesses of EPA’s absurdity argument).
language of the CWA. The EPA cannot correct a statute to promulgate the EPA's preferred policy over congressional policy. While statutory language is the best evidence of congressional intent, courts have occasionally found that judicial statutory correction is warranted when statutory language is troubling and other evidence of congressional intent is compelling. In this case, however, the D.C. Circuit found no conflict between congressional intent and the statute.

With respect to a statute's judicial interpretation, Congress "blames the courts... when an interpretation has become accepted in the community even if that interpretation does not necessarily reflect the intent of the enacting Congress." Notwithstanding the D.C. Circuit's holding in Friends of the Earth, the EPA's statutory interpretation may become accepted precedent throughout the Nation as the EPA has approved annual and seasonal TMDLs in several states.

If... courts (or... agencies) have interpreted a statute a particular way and Congress has not amended the statute, a court may assume... Congress agrees with the interpretation because it has acquiesced in it. The argument gains force... [with proof] Congress considered the issue but declined to act.

In Muszynski, the Second Circuit held that under the CWA, the EPA has discretion to approve TMDLs for time periods other than...
daily. Nevertheless, several years have passed since the Second Circuit's 2001 decision, and Congress has not amended the CWA provisions to specify TMDLs shall be limited strictly to daily loads. Because of Congress's failure to amend the CWA following Muszynski, Congress may have acquiesced to the community standard of establishing annual and seasonal loads; therefore, congressional intent may conflict with the D.C. Circuit's decision in Friends of the Earth.

VI. IMPACT

The D.C. Circuit's literal interpretation of the term "daily" created a circuit split by conflicting with the Second Circuit's broad interpretation and allowance for the creation of maximum pollutant loads for various time periods. The EPA has approved annual and seasonal loads in several states, so this circuit split will impact existing and future TMDLs across the Nation. Additionally, due to the D.C. Circuit's "authority to review federal rulemakings," it is unclear whether the D.C. Circuit's decision will carry more weight than if the ruling had been made in a different circuit.

The EPA has several options available to facilitate compliance with the court's literal interpretation of the term "daily." The EPA has the authority to change its regulation, which proclaimed all pollutants are suitable for daily loads; however, the court has no

137. See Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 103 (2d Cir. 2001) (holding CWA does not require pollutant loads be expressed strictly as loads per day and EPA has discretion to approve loads for other time measurements).


139. See Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 144 (D.C. Cir. 2006) (describing application of Chevron analysis and interpreting daily strictly to preclude EPA-approval of pollutant loads for other time periods); see also Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 103 (2d Cir. 2001) (interpreting daily broadly to permit EPA-approval of pollutant loads for various time periods).

140. See Appellate Split, supra note 6, at 18-9 (describing impact of holding with respect to established seasonal annual loads across nation); see also EPA, supra note 6 (listing EPA-approved TMDLs across Nation by state and body of water).

141. Appellate Split, supra note 6, at 19 (stating unnamed industry attorney's opinion on potential impact of D.C. Circuit holding). "[T]he source notes that the D.C. Circuit is often treated as having more weight and more authority than other circuits." Id. (internal quotations omitted).

142. See Friends of the Earth, 446 F.3d at 148 (suggesting parties move to stay district court's order to give District of Columbia opportunity to revise pollutant loads or EPA opportunity to amend regulation); see also David Loos, Water Pollution: Grumbles Says EPA Considering Several Options After TMDL Ruling, GREENWIRE, May 3, 2006, available at www.eenews.net/gw/ (describing EPA's position at National Clean Water Policy Forum following court's holding in Friends of the Earth).
authority to enact or amend the regulation. The court also instructed interested parties to direct statutory ambiguity concerns to Congress and the EPA for resolution. Heeding this suggestion, at the National Clean Water Policy Forum, Ben Grumbles, Chief Water Administrator for the EPA, stated: "[w]e will look at whether . . . we can respond to the decision in a non-regulatory way, . . . [whether] we need to revise our regulations on TMDLs, and . . . [whether] the best approach is working with Congress on a targeted statutory change."  

Due to potential confusion created by the circuit split after Friends of the Earth and the prevalence of annual and seasonal TMDLs around the country, this case had the potential to be reviewed by the United States Supreme Court. The District of Columbia Water and Sewer Authority, an intervenor-defendant in Friends of the Earth, filed a petition for writ of certiorari with the United States Supreme Court on July 21, 2006. Despite the far-reaching implications of the circuit split, the petition for a writ of certiorari was denied on January 16, 2007. In a jurisdiction where there is no precedent, courts may interpret the CWA provision either literally or broadly, depending on which circuit opinion the court finds more persuasive.

In response to Friends of the Earth, the EPA circulated a draft guidance intended to implement the D.C. Circuit's holding. The draft guidance "gives regulatory authorities the option of using annual or seasonal limits in enforceable clean water permits—as long as the seasonal or annual limits are consistent with TMDLs

143. See Friends of the Earth, 446 F.3d at 146 (contrasting EPA's authority and role to amend regulation with court's limited role to interpret statute as written).
144. See id. at 148 (explaining alternative options for interested parties given court's limited authority).
145. Loos, supra note 142 (describing EPA's considerations in its response to Friends of the Earth opinion).
146. See Appellate Split, supra note 6, at 18 (describing one industry attorney's perspective of future of Friends of the Earth case).
147. Petition for Writ of Certiorari at i, District of Columbia Water and Sewer Authority v. Friends of the Earth, Inc., No. 05-5015 (U.S. July 26, 2006), 2006 WL 2085275 (presenting issues as to whether D.C. Circuit's decision contravenes basic principles of statutory construction and whether decision leads to absurd and unjust results).
149. See generally Appellate Split, supra note 6, at 18-9 (explaining confusion in establishing future TMDLs due to circuit split).
containing daily increments . . .

Environmental organizations view the EPA's draft guidance as the least intrusive method to incorporate the Friends of the Earth decision into the TMDL program.

Industry sources believe, however, the draft guidance will not likely deter litigation initiated by environmental organizations because the draft does not require daily limits in enforceable discharge permits.

Environmental activists will not support the guidance unless the EPA sets such daily limits, demonstrated by one case where environmental activists sued the EPA to impose daily limits in both the TMDLs and the resulting permits.

The D.C. Circuit created a circuit split by adopting a literal interpretation of the term "daily" as being the only permissible time period for which the EPA could establish maximum pollutant loads.

This holding is contrary to the Second Circuit's broader interpretation of the term "daily" in Muszynski, which permitted the establishment of maximum pollutant loads for various time periods.

In jurisdictions where the issue has not yet been decided, however, the EPA can continue to approve maximum pollutant loads for any time period.

The D.C. Circuit left the EPA with several ways to comply with its holding. As the EPA struggles to find the method of compliance that best suits its needs, the EPA can expect to face continued controversy. Consequently, environmental organizations will continue to dive deep within their re-

151. Id. (explaining terms of EPA draft guidance). With respect to the draft guidance, while it may appear the EPA is technically complying with the D.C. Circuit's decision, the EPA is actually acting contrary to the environmental activists' intent. See id. (developing environmentalist organizations' purported view on EPA's draft guidance).

152. See id. (describing background behind environmentalist organizations' distrust of EPA's draft guidance).

153. See id. (discussing industry opinion on impact of EPA's draft guidance).

154. See id. (describing background of Friends of the Earth lawsuit and general environmentalist organizations' perceptions of draft guidance).

155. See Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 144 (D.C. Cir. 2006) (interpreting daily narrowly to preclude EPA-approval of annual and seasonal pollutant loads).

156. See Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 103 (2d Cir. 2001) (interpreting daily broadly and emphasizing EPA’s discretion to approve pollutant loads for various time periods).

157. See generally Appellate Split, supra note 6, at 18-9 (describing impact of Friends of the Earth opinion with respect to established seasonal and annual loads across the Nation and future implementation of TMDLs); see also EPA, supra note 6 (listing approved TMDLs per state).

158. See Friends of the Earth, 446 F.3d at 148 (suggesting EPA amend regulation claiming all pollutants suitable for TMDL calculation); see also Loos, supra note 142 (stating EPA needs to revise TMDL regulation or request Congress amend language in CWA).
sources, ultimately hoping to improve the quality of our Nation’s troubled waters.

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