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Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3rd Cir. 2015)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281 (3rd Cir. 2015) (holding that the EPA did not exceed the scope of its authority or intrude on states' roles in regulating land use when, as a part of its Chesapeake Bay total maximum daily load, the agency: (i) allocated permissible levels of pollutants among different sources of those pollutants; (ii) specified target dates for reducing pollutant discharges down to the level the total maximum daily load specified; and (iii) gained "reasonable assurance" from states that they would fulfill the total maximum daily load objectives).

The Chesapeake Bay impacts at least seventeen million people and has been a topic of ecological concern for several decades. Commercial activities contribute pollutants to the Bay, which cause dead zones in significant parts of the bay that are unable to support aquatic life. The EPA published a total maximum daily load ("TMDL"), which is the amount of pollutants a water body can absorb without violating water quality standards, for the Chesapeake Bay. The EPA intended TMDLs to be frameworks for pollution reduction. States use TMDLs to set "water quality standards," which the EPA must then approve. If the EPA does not approve, the agency itself is responsible for establishing its own standards.

The American Farm Bureau Federation, the National Association of Home Builders, and other organizations for agricultural industries ("Farm Bureau") claimed that the phrase "total maximum daily load" in the Clean Water Act ("Act") referred only to a number that represented the amount of pollutant that could be discharged into a particular segment of water. Therefore, Farm Bureau argued, even if aspects such as allocations, target dates, and reasonable assurances contributed to calculating the TMDL, the final document should have contained only the final TMDL number the EPA determined.

The United States District Court for the Middle District of Pennsylvania ("district court") granted summary judgment in favor of the EPA. The Farm Bureau then appealed to the United States Court of Appeals for the Third Circuit ("Court"). On appeal, the Farm Bureau argued: (i) the EPA exceeded its statutory authority by incorporating deadlines and allocations in the TMDL and by requiring "reasonable assurance" from the states that the TMDL would be met; (ii) the term "total" in the TMDL should mean that the EPA provides one final TMDL number without setting any deadlines to accomplish the TMDL or requesting any reasonable assurances that states would meet them; and (iii) the EPA's TMDL unconstitutionally encroached upon state policy-making in

the areas of land use and zoning.

In considering the Farm Bureau's claim, the Court relied on *Chevron v. NRDC*, which outlined a two-step process. In step one, a court should consider congressional intent. If the intent is clear and unambiguous, and the agency's action followed the clearly stated congressional intent, the decision is final. However, if that intent is ambiguous, the court should move to step two, which includes looking at the agency's interpretation. This interpretation is controlling as long as it is a "reasonable policy choice."

In evaluating whether the congressional intent was ambiguous, the Court first considered case law on TMDLs. The Court found that, where the Act is ambiguous, broad regulatory authority is granted to the EPA. The Court further found that courts have consistently recognized the EPA's authority to determine the requirements for TMDLs. Therefore, the Court held that the Congressional intent was ambiguous, and the EPA may interpret how to calculate TMDLs.

Second, the Court considered statutory text, which dictated that the EPA has the authority to publish "total maximum daily load[s]." While Farm Bureau argued that a "total load" should only be a single number, the Court determined that Congress did not necessarily intend the word "total" to be interpreted that narrowly. The Court found that because the EPA used notice-and-comment rulemaking for TMDLs, the Administrative Procedure Act required the EPA to provide sufficient supporting information to explain how it came to its conclusions about the TMDL to enable the public to comment on its conclusions. Therefore, the Court concluded that a single number would not be sufficient to allow the EPA to meet this requirement. The Court also noted that requiring one number would go against the Act's goal of providing a cooperative framework for states and the federal government to work together to eliminate water pollution.

Third, the Court considered the structure and purpose of the Act. The Court noted the Act facilitates a partnership between the states and the federal government in the shared objective of restoring and maintaining the nation's waters. The Court determined that Congress' silence authorized the EPA to determine how to calculate TMDLs. The Court further reasoned that the EPA had the authority to state what it used to calculate TMDLs and to require states provide "reasonable assurance" that they would comply with TMDL standards.

Finally, the Court considered whether the EPA's Chesapeake Bay TMDL intruded on state regulation of land use and, therefore, could not be permitted without a "clear statement" from Congress. The Court determined that the states were not coerced into accepting the TMDL, and the TMDL gave states flexibility in achieving limits the EPA set by presenting source allocation by sector. Thus, the Court found that this preserved state autonomy in land use and zoning. Moreover, the Court held that since the Chesapeake Bay is a channel of interstate commerce with an estimated value of more than one trillion dollars. The federal government has authority to regulate channels of interstate commerce and navigable-in-fact waterways. Therefore, there were no constitutional concerns with the EPA's interpretation of the statute. Given these considerations, the Court held that there were no concerns of intrusion on state regulation that were so significant as to require a "clear statement" from Congress.

For step two under *Chevron*, the Court contemplated both the legislative history and whether the EPA made a “reasonable policy choice” in its interpretation of the phrase “total maximum daily load.” In these considerations, the Court concluded that because Congress used some of the language from the EPA’s rule, the EPA had a strong argument that Congress both agreed with the EPA’s TMDL definition and also affirmatively incorporated the EPA’s rule into statute. In addition, the Court determined that the EPA’s requirements concerning TMDLs, including allocating among different kinds of sources, establishing a timetable, and getting “reasonable assurance” from states that the TMDLs would actually be implemented, were all reasonable. Therefore, the Court held that the EPA made a reasonable and legitimate policy choice in having these requirements.

Accordingly, the Court affirmed the district court’s opinion that the EPA did not exceed its authority to regulate through the Chesapeake Bay TMDL requirements.

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gulf Restoration Network v. McCarthy, 783 F.3d 227 (5th Cir. 2015) (holding that: (i) the EPA’s refusal to regulate pollution resembled a rejection of a rulemaking petition, which is presumptively reviewable by the courts; (ii) the Clean Water Act possesses sufficiently specific language to allow for judicial review; and (iii) the EPA may refrain from making a necessity determination if it uses the language of the Clean Water Act to explain its decision).

In July 2008, a group of nonprofit environmental organizations, led by the Gulf Restoration Network (“Network”), petitioned the Environmental Protection Agency (“EPA”) to regulate the high levels of nitrogen and phosphorous pollution that have entered waters in the Mississippi River Basin and created what the petition called a “dead zone” in the northern Gulf of Mexico. The EPA denied this petition, deciding that it could create more efficient regulations by working cooperatively with the states. Network then filed suit in the United States District Court, Eastern District of Louisiana, alleging that the EPA violated both the Administrative Procedure Act (“APA”) and the Clean Water Act (“CWA”). The relevant section of the CWA stipulates that the EPA can directly create water standards if: (i) the state-created standards do not satisfy the requirements of the CWA; or (ii) the administrator decides that a new or improved standard is necessary. The district court ruled that the Supreme Court’s decision in *Massachusetts v. EPA* required the EPA to make the requested necessity determination before denying the petition, and the court remanded the matter to the EPA to conduct such a determination. The EPA appealed the decision to the United States Court of Appeals, Fifth Circuit (“Court”).

The Court began its inquiry by reviewing the district court’s holding that it possessed subject matter jurisdiction to review the EPA’s action. Generally, the United States government and its agencies possess sovereign immunity and are not subject to civil actions unless they consent to suit. Congress waived this immunity in the APA, which created a general presumption that the courts have