Nos. 00-16026 and 00-16027

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDO A. PRONSOLINO *et al.*,
Petitioners-Appellants,

AMERICAN FOREST AND PAPER ASS'N *et al.*,
Intervenors-Appellants,

v.

WAYNE NASTRI, Regional Administrator,
United States Environmental Protection Agency *et al.*,
Respondents-Appellees.

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC. *et al.*,
Intervenors-Appellees.

On Appeal from the United States District Court
For The Northern District of California,
No. CV-99-01828
The Honorable William Alsup, Presiding Judge

PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, the American Farm Bureau Federation, California Farm Bureau Federation, and Mendocino County Farm Bureau (the only corporate Petitioners-Appellants in this case) hereby disclose that none has a parent corporation or stock owned by a publicly-held company.

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INTRODUCTION AND STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(B)

This case presents a question of exceptional importance regarding whether the Clean Water Act ("CWA" or "Act") provides the Environmental Protection Agency ("EPA") with statutory authority to regulate waters that are polluted solely by "nonpoint sources" ("NPS") of pollution, such as runoff from farm and forestry lands.

As numerous federal Courts of Appeals have recognized, Congress in the CWA established a dual system of regulation. EPA may regulate "point source" ("PS") pollution, which emanates from a discrete conveyance such as a pipe or tunnel, but not water impaired solely by NPS pollution. Thus, while Congress intended the federal government to regulate point sources, states would manage NPS pollution through voluntary, incentive-based programs. 33 U.S.C. §§ 1288(b)(2)(f), 1329. In addition, Congress established different types of regulation for the two types of pollution: recognizing the difficulties in predicting and controlling the runoff from storm events, Congress elected to manage NPS with more flexible standards, rather than the strict numerical limits imposed on point sources. Despite this statutory system, EPA, in a breathtaking assertion of power, has claimed that Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), authorizes EPA to regulate NPS pollution through the establishment of

total maximum daily loads ("TMDLs"), which limit the amount of pollutants that may enter the water.

Section 303(d)(1) of the Clean Water Act requires states to (1) identify those waters for which certain pollution controls, known as "effluent limitations," "are not stringent enough" to implement water quality standards, and (2) establish TMDLs of designated pollutants for those waters. 33 U.S.C. § 1313(d)(1). EPA is to identify the relevant waters and establish the TMDLs if it disapproves those submitted by a state. *Id.* at § 1313(d)(2). By its text, this section does not apply to waters impaired solely by nonpoint sources of pollution, because "effluent limitations" are defined in the CWA to apply only to pollutants "discharged from point sources." 33 U.S.C. § 1362(11).

In an unprecedented and far-reaching holding, the panel in this case concluded that Section 303(d) authorizes EPA to establish TMDLs for waters polluted solely by NPS pollution, notwithstanding the plain meaning of the text to the contrary. The panel decision is inconsistent with past Ninth Circuit precedent and with decisions of other U.S. Courts of Appeals, which uniformly recognize that the statutory scheme established by Congress does not provide EPA with regulatory authority over NPS pollution. The panel's holding is also contrary to Congress's clear intent in the CWA as expressed in the plain language, structure, and legislative history of the Act.

The decision has wide-reaching implications, permitting EPA to expand dramatically the reach of its regulatory authority under the CWA. In California, for example, EPA estimates that 54 percent of California's impaired waterways are polluted solely by nonpoint sources.[1] The panel's sweeping opinion will thus more than double the number of waterways in California that EPA may regulate. In addition, the panel's holding will disrupt existing NPS control programs, imperil the principles of federalism embodied in the Act's structure by shifting control of NPS regulation from the states to the federal government, and unrealistically require private parties and businesses to comply with arbitrary and unattainable regulatory restrictions.

Rehearing or rehearing en banc is necessary to address the important circuit conflict created by the panel decision, particularly in view of the need for national uniformity in the interpretation of EPA's statutory authority under the CWA to regulate NPS pollution.

FACTUAL AND PROCEDURAL BACKGROUND

For more than twenty years since the creation of the Clean Water Act in 1972, settled opinion had understood the Act to establish two separate water pollution control programs – one for point sources and one for nonpoint sources.

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[1] Region 9 News Release, EPA, Federal Appeals Court Upholds Landmark Clean

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Although Congress was well aware of the problems associated with NPS pollution in 1972, Congress recognized that those problems required special consideration and thus decided to treat point and nonpoint sources separately in the CWA.

Point sources and "effluent limitations" are the focal point of the Act. Congress granted EPA distinct powers to address point sources, which are regulated by the CWA's centerpiece, a federally enforceable permit system set forth in Sections 402 and 301 of the Act. 33 U.S.C. §§ 1311, 1342. The permit scheme, the National Pollutant Discharge Elimination System ("NPDES"), is designed to achieve and enforce "effluent limitations," which restrict "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." 33 U.S.C. § 1362(11). Effluent limitations and the federal permit scheme are inapplicable to NPS pollutants. *Id.*; *Oregon Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

In contrast to PS regulation, nonpoint sources are dealt with in two separate provisions – Sections 208 and 319 – provisions that encourage states to manage NPS pollution through voluntary, incentive-based programs. 33 U.S.C. §§ 1288(b)(2)(f), 1329. Section 208 promotes regional waste treatment

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Water Decision (June 3, 2002).

management plans by state and local governments. 33 U.S.C. § 1288. In 1987, Congress concluded that Section 208 had been ineffective in addressing NPS pollution and therefore enacted Section 319, entitled "Nonpoint source management programs," which is patterned after Section 303(d). Both sections call for states to identify waters that fail to meet water quality standards and to take action to bring those waters into compliance, but Section 319 specifically deals with NPS. 33 U.S.C. § 1329.

This litigation concerns Section 303 of the CWA, 33 U.S.C. § 1313, which addresses water quality standards. Subsections (a), (b), and (c) address the establishment and modification of water quality standards. Section 303(d)(1) deals with waters failing to meet water quality standards after application of certain effluent limitations. Section 303(d)(1)(A) requires each state to "identify those waters within its boundaries *for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough* to implement any water quality standard applicable to such waters." *Id.* § 1313(d)(1)(A) (emphasis added). States then rank those waters and establish TMDLs for particular pollutants.[2] *Id.* §§ 1313(d)(1)(A), (C). If EPA does not approve the state's

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[2] TMDLs are the maximum quantities of a pollutant that can be added to a water segment without reducing water quality below the applicable standard. 40 C.F.R. § 130.2(i).

identified waters and TMDLs, it must identify the relevant waters and establish the TMDLs itself. *Id.* § 1313(d)(2).

In 1992, EPA disapproved California's bi-annual Section 303(d)(1) list of substandard waters because it did not include, among other bodies of water, the Garcia River. Attempting to exert its purported authority to regulate waters impaired solely by NPS pollution, EPA added the Garcia River to the Section 303(d)(1) list for California and, in March 1998, established a TMDL for the Garcia River. Plaintiffs-Appellants – owners of land along the Garcia River and organizations representing such landowners who were harmed by EPA's conduct – brought suit under the Administrative Procedure Act, contending that EPA lacks authority under Section 303(d)(1) of the CWA to apply the TMDL regulatory process to waters, such as the Garcia River, that are not polluted by point sources and thus not subject to the "effluent limitations" specified in Section 303(d)(1)(A).

On cross-motions for summary judgment, the district court adopted EPA's theory and ruled in favor of defendants. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1338 (N.D. Cal. 2000). A panel of this Court affirmed. *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) (Exhibit A hereto). Although Section 303(d)(1)(A) expressly applies only to waters subject to effluent limitations (those for which the specified effluent limitations "are not stringent enough"), and although effluent limitations are statutorily defined as applicable only to PS

pollution, the panel held that Section 303(d)(1)(A) authorizes EPA to regulate waters polluted solely by NPS. *Id.* at 1140.

REASONS FOR GRANTING REHEARING OR REHEARING EN BANC

I. The Panel Decision Is Inconsistent With Precedents From This And Other U.S. Courts Of Appeals And Ignores Congress's Clear Mandate to Exclude NPS-Only Polluted Waters from TMDL Regulation.

A. The Panel Decision Conflicts With The Plain Text, Structure, And Legislative History Of The CWA.

The Panel's sweeping opinion will expand dramatically the reach of the Clean Water Act by departing from the Act's plain text, statutory structure, and legislative history. The Panel's contorted reading of Section 303(d)(1)(A) is contrary to the plain meaning of the statutory language.[3] Section 303(d)(1)(A) of the CWA authorizes EPA to impose mandatory TMDLs only for "waters . . . for which [specified] effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). It is undisputed that only PS pollution is subject to the "effluent limitations" that circumscribe the reach of this statutory authorization. *Id.* § 1362(11). Thus, the

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[3] Even if EPA's interpretation were entitled to deference, it is unreasonable because it conflicts with the statute's plain meaning. *See, e.g., MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of

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only waters "for which [the specified] effluent limitations" are not sufficient to achieve water quality standards are those impaired by PS pollution to which the "effluent limitations" apply.

The Panel's interpretation of Section 303(d)(1)(A) turns the plain statutory language on its head. According to the Panel, the provision begins by requiring a list of *every* navigable water within a state, from which a set of waters is then removed – those waters that will meet the water quality standards after any effluent limitations, which may or may not apply, are taken into account. *Pronsolino*, 291 F.3d at 1136. But this reading is entirely backwards. The requirement begins and ends with a list of all waters within a state's boundaries "*for which the [specified] effluent limitations . . are not stringent enough to implement*" water quality standards. 33 U.S.C. § 1313(d)(1)(A). To suggest that such waters include those waters to which effluent limitations can never apply is simply nonsensical. Indeed, where Congress intended the Act to apply to NPS-only waters, it had no difficulty specifying this intent in clear, express terms. *See, e.g.*, 33 U.S.C. § 1314(f)

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only waters "for which [the specified] effluent limitations" are not sufficient to

(expressly regulating "nonpoint" sources of pollution); *id.* § 1324(a)(1)(F) (same); *id.* § 1315(b)(1)(E) (same); *id.* § 1288(b)(2)(f) (same).[4]

Section 303(d)(1)(C) confirms the text's plain meaning, providing that the TMDLs applicable to the waters listed in Section 303(d)(1)(A) "shall be established" in a manner that "takes into account any lack of knowledge concerning the *relationship between effluent limitations and water quality*." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). But there can be no meaningful

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[4] The Panel's holding would render superfluous the phrase "for which the [specified] effluent limitations . . are not stringent enough." Congress could have implemented the meaning the Panel proposes simply by requiring states to "identify those waters within its boundaries [not meeting] any water quality standard applicable to such waters," thus deleting the relevant language. According to the Panel, the more reasonable interpretation of this Section is that Congress included the reference to effluent limitations – despite the fact that Congress sought to include NPS pollution to which those effluent limitations do not apply – in order to indicate that, "[i]f the pertinent effluent limitations would, if implemented, achieve the water quality standards but are not in place yet, there need be no listing and no TMDL calculation." *Pronsolino*, 291 F.3d at 1136. In addition, according to the Panel, the reference to effluent limitations "reflects Congress' intent that the EPA focus initially on implementing effluent limitations and only later avert its attention to water quality standards," a goal that is readily apparent from other provisions in the Act such as 33 U.S.C. § 1311(a). *Id.* at 1136-37. But if either of these explanations represented Congress's true purpose in including the effluent limitations clause, it is implausible that Congress would have selected such a vague and imprecise method of expressing its intent. The Panel's reading, moreover, would still render the phrase superfluous, because other sections require the implementation of effluent limitations independently of the quality of water at issue. *See, e.g.*, 33 U.S.C. § 1311(a). Under the panel's interpretation,

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"relationship" between effluent limitations and the quality of waters polluted exclusively by NPS, to which those effluent limitations are inapplicable.[5]

Notwithstanding the clear statutory language of Section 303(d), the Panel decided to read the "broad goal[s]" of the statute to authorize EPA to impose TMDLs on waters polluted exclusively by NP sources. *Id.* at 1135-36. Indeed, the Panel made it clear that it preferred to "look forward" to the "broad goal to be attained," rather than to look "backwards" at the "inadequate effluent limitations" that comprise the provision's plain text. 291 F.3d at 1135-36. But as the Supreme Court has warned, such interpretations that ignore a statute's words "run[] counter to basic rules of grammar." *HUD v. Rucker*, 122 S. Ct. 1230, 1234 (2002).

The Panel's inventive interpretation of Section 303(d) is also inconsistent with the CWA's structure. As discussed above, Congress established a regulatory structure that treats PS pollution and NPS pollution separately in the CWA. The Act focuses on point sources, requiring a federal permit for all PS discharges. NPS

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therefore, the effluent limitations phrase adds nothing to the meaning of the CWA.

5 Indeed, if the Panel's interpretation were correct, the TMDL requirement would apply to all waters impaired by NPS-only pollution, regardless of whether the water quality standard had been met, because the Panel relies on the notion that inapplicable effluent limitations can do no "implement[ing]" (and thus no sufficient implementing) rather than the fact that a water quality standard has or has not been attained. *Pronsolino*, 291 F.3d at 1137.

pollution, on the other hand, is addressed in Sections 208, 319, and 303(d)(3). Waters polluted exclusively by NPS are governed by voluntary, estimate- and state-driven compliance measures mandated "to the extent feasible" and "to the extent practicable," rather than by the rigid quantitative load controls and effluent limitations applicable to point sources. *Oregon Natural Res. Council*, 834 F.2d at 849. The reason for this distinction is simple – unlike PS pollution, neither rainfall nor runoff occurs with the predictability and precision contemplated by strict quantitative effluent limitations and TMDL controls. Accordingly, Congress chose to manage NPS with more flexible standards, 33 U.S.C. §§ 1288, 1329, 1313(d)(3), while imposing on PS pollution strict numerical limits and load controls. *Id.* § 1311. *See also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998)

Section 208 comprehensively addresses NPS pollution through regional waste management treatment plans, with no indication that those plans are subject to mandatory TMDLs. Section 319, added to the CWA in 1987 to combat NPS pollution further, contains provisions parallel to those of Section 303(d)(1). Both require states to identify waters that fail to meet water quality standards and to take action to improve the water quality. Section 303(d)(3), moreover, provides that for discharges into waters not subject to the effluent limitations specified in Section 303(d)(1)(A), states need not establish TMDLs. Instead, they need only "estimate"

TMDLs "[f]or the specific purpose of developing information," with no need to obtain EPA's approval. *Id.* § 1313(d)(3).

To apply Section 303's more stringent TMDL requirements to exclusively NPS discharges would render these less stringent standards redundant. The Panel simply disregards the clear structural import of these Sections, asserting, for example, that because there is no "irreconcilable contradiction" between Section 319 and Section 303(d)(1)(A), the significance of the sections' parallel structure is nil. 291 F.3d at 1138.

Finally, the statute's legislative history confirms that Congress limited the TMDL mandate of Section 303(d)(1)(C) to waters polluted by PS. Congress explained that "all *point sources* could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent limitations . . . are inadequate to meet those water quality standards. In this case, a more stringent *effluent limitation* [*i.e.*, the TMDL requirement] will be imposed." H.R. Rep. No. 92-911 (1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 753, 792 (1973) (emphasis added). Thus, Congress intended the TMDL requirement to serve as a "backup" effluent limitation to supplement inadequate effluent limitations on PS pollution, not as a new limitation applicable to discharges that have never been subject to effluent limitations. The legislative history is replete with similar

statements confirming the statute's plain text. *See, e.g., id.* (the water quality standards in Section 303 "will be utilized for the purpose of setting *effluent limitations* in those cases where *effluent limitations for point sources* would not be consistent with such standards") (emphasis added). The Panel simply dismisses the legislative history as unpersuasive.

B. The Panel Decision Cannot Be Reconciled With Precedents From The Ninth Circuit And Other Courts Of Appeals.

Not surprisingly in light of the CWA's clear statutory scheme, numerous Courts of Appeals, including the Ninth Circuit, have reached decisions contrary to the inventive reading of the CWA adopted by the Panel here.

The Panel's decision is irreconcilable with prior Ninth Circuit precedents. In *Oregon Natural Desert Ass'n*, 172 F.3d at 1092, for example, the Ninth Circuit explicitly rejected the interpretation of Section 303 of the CWA adopted by the Panel, observing that Section 303 "does not itself regulate nonpoint source pollution." *Id.* at 1097. As the Court explained:

> Appellees contend section 1313, requiring states to establish water quality standards, relates to nonpoint source pollution because it addresses water quality standards and implementation plans. *The section does not itself regulate nonpoint source pollution.* Water quality standards are established in part to regulate point source pollution. They provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels."

Id. (emphasis added).

Similarly, in *Oregon Natural Res. Council*, 834 F.2d at 842, the Ninth Circuit held that a provision of the CWA nearly identical to the provision at issue here did not apply to NPS pollution. *Id.* at 849. Section 301(b)(1)(C), like Section 303(d)(1)(A), mandates the implementation of additional pollution control measures that are necessary to achieve water quality standards: "[T]here shall be achieved . . . any more stringent limitation, including those . . . required to implement any applicable water quality standard established pursuant to this Act." 33 U.S.C. § 1311(b)(1)(C). The Court in *Oregon Natural Res. Council* rejected the plaintiffs' argument that Section 301(b)(1)(C) applies to NPS pollution because, the plaintiffs argued, the section "incorporates state water quality standards established pursuant to section 1313 and does not explicitly refer to point sources." *Oregon Natural Res. Council*, 834 F.2d at 849. As the Court explained, Congress "drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under the Act. . . . Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans." *Id. See also Oregon Natural Desert Ass'n*, 172 F.3d at 1097 (noting that, in *Oregon Natural Res. Council*, the Court "held that the reference to water quality

standards in § 1311(b)(1)(C) d[oes] not sweep nonpoint sources into the scope of § 1311").

The Panel's holding here that inapplicable effluent limitations are, by definition, "not stringent enough to implement the applicable water quality standard" for waters polluted solely by NPS pollution applies with equal force to the language in 301(b)(1)(C), mandating a result contrary to the Court's precedent in *Oregon Natural Res. Council*. More specifically, because the inapplicable effluent limitations would be, by definition, insufficient to achieve water quality standards for waters polluted only by NPS, additional pollution control measures – "more stringent limitation[s]" – would be "necessary . . . to implement any applicable water quality standard" for NPS-only impaired waters. The Panel's decision, therefore, would overturn this precedent and require that Section 301(b), clearly directed at PS pollution only, apply to NPS.[6]

The Panel decision is likewise incompatible with numerous decisions by other Courts of Appeals. In a recent Tenth Circuit opinion (issued after completion of the briefing in *Pronsolino*), for example, the Court held, in sharp contrast to the opinion of the Panel, that EPA lacks statutory power under the CWA to regulate

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[6] The Ninth Circuit case on which the Panel primarily relies, *Dioxin/ Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1519 (9th Cir. 1995), by contrast, neither involved nor mentioned NPS pollution.

NPS. *American Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001). As the Tenth Circuit explained: "In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution." *Id.* Because EPA has no power under the CWA to regulate NPS pollution, the Court reasoned, EPA properly approved a state's decision to exclude NPS pollution from certain water quality standards. *Id.* at 1196-98. *See also id.* at 1198 (the CWA "nowhere gives the EPA the authority to regulate nonpoint source discharges"); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (noting that Congress "purposefully phrased" the definition of PS pollution "broadly," because EPA's regulatory authority depended on a finding that the pollution at issue was PS pollution).

Likewise, the Eleventh Circuit in *Sierra Club v. Meiburg*, 2002 U.S. App. LEXIS 13197 (11th Cir. July 2, 2002) (issued after release of the *Pronsolino* Panel's decision), observed that "[t]he Act generally leaves regulation of non-point source discharges through the implementation of TMDLs to the states" through Section 319. *Id.* at *11. As discussed above, Section 319, 33 U.S.C. § 1329, titled "Nonpoint source management programs," was added by Congress in 1987 to address NPS pollution because Section 208 had proved ineffective. The Court also made clear that Section 303(d) applies to PS polluted waters, revealing the implicit

premise that, contrary to the Panel's decision here, exclusively NPS pollution must be addressed using other CWA provisions such as Section 319. *Id.* at *6-11.

The Fourth Circuit Court of Appeals likewise has reached a result at odds with the Panel's decision here. In *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), the Court set aside an attempt by EPA to regulate uncollected runoff, observing that "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former." *Id.* at 1373. As broad as the definition of PS pollution may be, the Court reasoned, EPA may not regulate "unchannelled and uncollected surface waters," but must "limit any subsequent controls to 'point sources.'" *Id.* at 1373-74. *See also American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) (EPA "exceeded its statutory authority when it sought to impose effluent limitations upon non-point-source discharges").

Because the Panel's tortured reading of Section 303(d) of the CWA cannot be squared with other circuit court opinions or with the plain statutory text, rehearing or rehearing en banc is necessary to maintain uniformity in the Court's decisions.

II. Whether The CWA Authorizes EPA To Regulate NPS Pollution Is Exceptionally Important And Has Far-Reaching Impacts.

The Panel's decision will have enormously wide-reaching and significant impacts. The holding will disrupt existing NPS control programs and will conflict

with the CWA's allocation of federal and state responsibilities. Under the CWA, the federal government regulates point sources, while the states manage NPS pollution. As Congress recognized, the diffuse nature of NPS pollution requires that it be addressed through local land use practices. *See* 117 Cong. Rec. 38825 (1971). Land use regulation "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). Because Congress did not make "unmistakably clear in the language of the statute" any intent to interfere with that core state and local function, the Panel's interpretation cannot stand. *Vermont Agency of Nat'l Res. v. U.S.*, 529 U.S. 765, 787 (2000).

The Panel's decision will also impose onerous economic burdens on farmers, small business owners, and individuals. Once a TMDL for NPS pollution is mandated, landowners within the watershed will need to implement preventative and/or restorative land management practices, resulting in significant costs. Indeed, the TMDL mandate adopted for the Garcia River in California alone has imposed more than $12 million in costs related to the three pieces of property owned by the Plaintiffs in this case. *Pronsolino*, 291 F.3d at 1129-30. Throughout California, more than 15 million acres of land would be affected by TMDLs attributable to NPS-only pollution. California EPA Staff Report: Revision of the Clean Water Act Section 303(d) List of Water Quality Limited Segments (April 2002) <http://www.swrcb.ca.gov/tmdl/docs/segments/draft_staff_rpt303d_

vol1_040202.pdf>. Nationwide, there will be more than 40,000 TMDLs in the future related to both PS and NPS pollution, which will affect more than 21,000 river segments, lakes, and estuaries. *See* <http://oaspub.epa.gov/waters/national_rept.control>;<www.nap.edu\catalogue\10146.html>.

Finally, the Panel's holding permits EPA to expand dramatically the reach of its regulatory authority under the CWA, potentially doubling the number of waterways that EPA is authorized to regulate. This massive increase in EPA power is plainly inconsistent with the CWA's provisions.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant the Petition for Rehearing or Rehearing En Banc.

Dated: July 15, 2002.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached Petition for Rehearing or Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,174 words. This word count excludes the corporate disclosure statement, table of contents, table of authorities, list of counsel, and certificates of counsel.

Gillian W. Thackray

Dated: July 15, 2002.

CERTIFICATE OF SERVICE

I declare that on this 15th day of July, 2002, I caused the attached Petition for Rehearing or Rehearing En Banc to be served via U.S. mail upon counsel listed below:

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