

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDO A. PRONSOLINO, et al.,
Plaintiffs-Appellants,

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

v

**FELICIA MARCUS, REGIONAL ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,**
Defendants-Appellees,

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

BRIEF OF THE FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked under 28 U S C 1331 and the
Administrative Procedure Act ("APA"), 5 U S C 702, 704

This Court's jurisdiction rests on 28 U.S.C. 1291. Appellants' notices of appeal were timely under Fed. R. App. 4(a)(1)(B). ER 131, 132.

STATEMENT OF THE ISSUE

The United States Environmental Protection Agency ("EPA") interprets Sections 301(d)(1) and 301(d)(2) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. 1313(d)(1, 2), to require listing of and establishment of total maximum daily loads ("TMDLs") for polluted waters when technology-based effluent limitations will not bring the waters into compliance with applicable water quality standards, without regard to whether the pollutants originate from "point sources," "nonpoint sources," or a combination of the two. The question presented is whether EPA's interpretation of Section 303(d) is reasonable and consistent with the Act.

STATEMENT OF THE CASE

A. **Nature of the Case** Appellants, landowners and agricultural and timber trade associations, brought this action under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, alleging generally that the EPA lacked statutory authority under CWA Sections 303(d)(1) and 303(d)(2) to require listing and TMDL establishment for waters that fail to meet applicable State water quality standards ("WQS") because of pollutants, such as sediment, coming from nonpoint sources.

(“NPS”)^{1/} The waterbody at issue is the Garcia River in Northern California, where water quality is degraded as a result of sediment loading associated with timber harvesting and other activities. The river formerly provided excellent habitat for salmon and other fish, but has since seen its stocks decline dramatically as a result of sedimentation. Appellants sought to invalidate the TMDL established by EPA for the Garcia River.

After a comprehensive analysis of the CWA and its history, the district court concluded that, as part of the water quality-based approach in the Act, Sections 303(d)(1) and 303(d)(2) require listing of and TMDLs for polluted waters for which effluent limitations are insufficient to attain WQS (referred to herein as “substandard” waters) regardless of the source of the pollutant. Accordingly, the court granted summary judgment for defendants. Pronsolino v. Marcus, 91 F Supp 2d 1337 (N.D. Cal. 2000) (slip opinion reprinted at Joint Excerpts of Record (“ER”) Tab 127).

^{1/} “The term ‘point source’ means any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged.” 33 U.S.C. 1362(14). The statute does not define “nonpoint source,” which is understood as a pollutant source other than a point source. See Richard J. Lazarus, Nonpoint Source Pollution, 2 Harv. Envt. L. Rev. 176 (1977). For simplicity, we follow the Appellants’ practice of referring to waters polluted by a combination of point and NPS as “blended” waters, though the CWA does not use that term (or any synonym).

B **Statutory And Regulatory Background** Section 303(d) of the CWA is one component of an integrated and complex water pollution control regime established through multiple congressional enactments “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters ” 33 U.S.C. 1251(a) It is best understood in the context of the overall CWA pollution control framework, the evolution of that framework, and the strategies supporting it

1 **The CWA’s Dual Pollution Control Strategies: “Source Neutral” Water Quality Standards and “Technology-Based” Controls for Point Sources.**

The CWA, as amended by the Federal Water Pollution Control Act Amendments of 1972, seeks to control water pollution by means of two different overarching strategies. The first, the “water-quality” based approach, was reflected in federal and State water pollution laws preceding the enactment of the CWA in 1972, and also adopted in certain provisions of that Act. That approach is based on WQS establishing the level of pollution that may be present in a waterbody, irrespective of the source of pollution. The second, “technology-based” approach, introduced in the 1972 Act, relies on technology-based regulation of the quantities of pollutants from point sources.

WQS and technology-based strategies derive from different statutory origins and reflect fundamentally different philosophies. See, e.g., William H. Rodgers, Jr.,

Environmental Law 252, 259-62 (2d ed 1994) [hereinafter “Rodgers”], see also EPA v. California, 426 U S 200, 202-05 (1976) As discussed below, Congress incorporated both control strategies in the 1972 amendments See H R Rep No 92-911, at 124 (1972) (noting that the two approaches “needed to be consolidated”)

The water quality-based approach to pollution control, originating in the Water Quality Act of 1965, Pub L No 89-234, 79 Stat. 903, is “source neutral,” i.e., it examines the combined impact of all contributing sources of pollution on the quality of the receiving water rather than on the control of particular sources Rodgers at 252-53, 260 Once a waterbody is identified as not meeting the applicable standards, States, or EPA, identify all contributing sources of pollution and take appropriate steps to limit those sources See EPA v. California, 426 U S. at 204 ^{2/} Under federal law, those steps may consist of enforceable permit limits on point sources, financial incentives, and voluntary pollution management measures adopted by landowners to reduce NPS pollution

By the early 1970s, a slim majority of the States had adopted federally

^{2/} Chapter 7 of EPA’s Water Quality Standards Handbook (2d ed 1994) describes the water quality-based approach and the role of TMDLs in more detail Federal Supplemental Excerpts of Record (“FSER”) 13-25.

approved WQS, Rodgers at 253, but it had proved very difficult to translate these ambient standards into “standards to govern the conduct of individual polluters” EPA v. California, 426 U S at 202-03 Hence, progress in ameliorating water quality was slow In 1972, Congress decided to undertake a “complete rewriting” of the statute Illinois v. Milwaukee, 451 U S 304, 317 (1981).

The 1972 amendments introduced a radically different approach Rather than focusing solely on the quality of the receiving water, Congress prohibited the discharge of any pollutant from point sources except as specifically allowed by statute or permit. 33 U S C 1311(a) ^{3/} As one aspect of the new CWA permit requirements, EPA was authorized, in Sections 301 and 304, to establish technology-based effluent limitations in regulations that incorporate increasingly stringent levels of pollution control technology over time on point source dischargers Id. 1311(b)(1)(A),(B), (b)(2), 1314; see E. I. du Pont de Nemours & Co. v. Train, 430 U S 112 (1977) ^{4/}

^{3/} The Act defines “discharge of a pollutant” as the addition of a pollutant from a point source 33 U S C 1362(12)

^{4/} EPA identifies technology-based restrictions on specific categories of point sources through rules known as effluent limitations guidelines 33 U S.C 1314(b), 1316(b)(1)(B) In establishing these regulations, EPA identifies the wastestreams to be regulated in a particular category, as well as a technology (or technologies) that represents the statutorily prescribed level of control for each wastestream (e.g.,
(continued.)

As a supplement to the new technology-based approach, the 1972 amendments preserved an important role for WQS, “extend[ing] and expand[ing] the water quality standards procedure initiated in the Water Quality Act of 1965 ” Comm On Public Works, 93d Cong, 1st Sess , 1 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 171 (Comm Print 1973)

Subsections 303(a), (b) and (c) of the CWA direct the States, with federal approval and oversight, to adopt and maintain WQS for intra- as well as interstate waters. 33 U S C 1313(a)-(c) By their nature, these standards are not identified with particular categories or sources of pollution but rather express a desired condition of the receiving water By retaining WQS in the Act, Congress maintained a safety net to ensure that water quality would be protected in the event technology-based controls were not sufficient

2 Section 303: Water Quality Standards, TMDLs, and the Continuing Planning Process

^{4/} (. continued)

“best practicable control technology”) The Agency then identifies the specific discharge limitations that correspond to application of the identified technology See du Pont, 430 U S at 130-31

a Water Quality Standards. In adopting a WQS, a State defines the water quality goals of a waterbody by designating its intended uses 33 U.S.C. 1313(c)(2)(A), 40 C.F.R. 131.3(f), 131.6(a), 131.10. Such uses may include, among others, drinking water, recreation, navigation and -- in the case of the Garcia River -- cold water fishery (e.g., salmon spawning and habitat). In addition, the State adopts criteria specifying the amounts of various pollutants that may be present in its waters without impairing the designated uses 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(b), 131.6(c), 131.11. These may be numerical or narrative criteria. 40 C.F.R. § 131.11(b), see generally Standards Handbook, F.S.E.R. 6-11, NRDC, 915 F.2d at 1317 (describing elements of WQS). For the Garcia River, California has established narrative criteria for sediment and settleable material which provide that such pollutants shall not cause "nuisance or adversely affect beneficial uses" like salmon spawning. ER Tab 91, Att. 1 at 9.

b The TMDL Process: Section 303(d) Lists and TMDL Development Section 303(d)(1)(A) requires each State to identify and prioritize those waters where technology-based controls are inadequate to attain WQS.

Each 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 quality standards applicable to such waters. The State shall establish a

priority ranking of such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. 1313(d)(1)(A) The State's identification of such substandard waters, which are known as "water quality limited segments" (or "WQLSs"), constitutes the "303(d) list." See 40 C.F.R. 130.7(b)^{2/} States have been required, since 1992, to submit their 303(d) lists to EPA for review every two years. 40 C.F.R. 130.7(d)(1) If it disapproves a State's list, EPA must establish a list for the State. 33 U.S.C. 1313(d)(2)

For all waters identified under Section 303(d)(1)(A) as exceeding WQS, the Act provides

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. 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

^{2/} Except where otherwise noted, we cite to the EPA TMDL regulations currently in effect. On July 11, 2000, EPA promulgated comprehensive revisions to the TMDL regulations, 65 Fed. Reg. 43586, reiterating EPA's longstanding interpretation that section 303(d)(1) applies to impaired waterbodies regardless of pollutant source. See 40 C.F.R. 130.25, 130.32. In anticipation of a congressional rider affecting EPA's implementation of the new TMDL rule, the rule was written to be effective 30 days after Congress allows EPA to implement it. The rider became effective on July 14, 2000. Absent further action by Congress, this rider prevents implementation of the new TMDL rule until at least October 31, 2001.

effluent limitations and water quality

33 U.S.C. 1313(d)(1)(C) The term “total maximum daily load” is not expressly defined in the CWA. EPA’s current regulations define a TMDL for a pollutant as the sum of the “wasteload allocations” allocated to point sources, the “load allocations” allocated to NPS or natural background, and a margin of safety. 40 C.F.R. 130.2(g-1). Therefore, a TMDL identifies the maximum amount of a pollutant that can be added to a waterbody (“its loading capacity”) without exceeding WQS. See Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 1520 (9th Cir. 1995) (“Dioxin”).

States must establish TMDLs for waters where pollutants are “preventing or expected to prevent attainment of water quality standards.” 40 C.F.R.

130.7(c)(1)(ii). Under Section 303(d)(2), EPA is required to review and approve or disapprove TMDLs established by States for listed waters. 33 U.S.C. 1313(d)(2). If it disapproves a State TMDL submission, EPA must establish the TMDL. 33 U.S.C. 1313(d)(2).

For all waters other than those identified under Section 303(d)(1), Section 303(d)(3) provides

For the specific purpose of developing information, each State shall identify *all waters within its boundaries* which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total

maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

33 U S C 1313(d)(3)(emphasis added) Whereas Section 303(d)(1) requires States to identify and establish TMDLs for waters not meeting WQS, Section 303(d)(3) requires States to identify and estimate TMDLs for waters that are not substandard Unlike TMDLs established under Section 303(d)(1), States are not required to submit TMDLs estimated pursuant to Section 303(d)(3) to EPA Information developed under Section 303(d)(3) may be used to protect waters to ensure they continue to meet WQS

TMDLs established pursuant to Section 303(d)(1) for impaired waters are not self-executing Limitations in loadings identified for point sources (i.e., “waste load allocations”) are enforced through permits issued pursuant to Section 402 of the Act. 40 C F R 122.44(d)(1)(vi)(B), NRDC, 915 F.2d at 1316. Limitations in loadings identified for NPS (i.e., “load allocations”), on the other hand, may only be “required” under State law See NRDC, 915 F.2d at 1316 (noting that CWA does not “directly prohibit[]” release of pollutants from NPS)

c Section 303(e)’s Continuing Planning Process In Section

303(e), Congress required each State to develop a “continuing planning process” (“CPP”) that would result in plans for all waters within the State. See 33 U.S.C. 1313(e)(3). These plans are required to include TMDLs, see 33 U.S.C. 1313(e)(3)(C), and “adequate implementation” for new and revised WQS. See 33 U.S.C. 1313(e)(3)(F). Congress, however, did not specify the method that States are to use (regulatory vs. non-regulatory) to carry out their plans, leaving that to the discretion of the States.^{6/} States are required to submit their CPPs to EPA for review and approval. 33 U.S.C. 1313(e)(2).

d. The CWA’s Implementation Tools. The CWA prohibits discharges of pollutants from point sources into the waters of the United States absent compliance with discharge limits and other requirements of a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. 1311(a), 1362(12), (14). An NPDES permit translates the generally applicable technology-based regulations and WQS into specific limits applicable to the individual

^{6/} According to EPA guidance, States’ approaches to implementing TMDLs for waters impaired by NPS should include “[r]easonable assurances that the NPS load allocations established in TMDLs will in fact be achieved. These assurances may be non-regulatory, regulatory, or incentive-based, consistent with applicable laws and programs.” ER Tab 91 Att. 7 at 6.

discharger EPA v. California, 426 U.S. at 205 ^{7/} TMDL allocations to point sources are implemented through NPDES permits. 40 C F R 122.44(d)(1)(vii)(B)

By contrast, the CWA provides no regulatory mechanism to control NPS pollution,^{8/} but rather uses federal grants to encourage the States to accomplish such reductions. NRDC, 915 F.2d at 1318. Under CWA Section 319, EPA disburses funds to the States to assist them with implementation of NPS management programs. 33 U.S.C. 1329(h). As a prerequisite to receiving grant funds, each State was required to submit by 1989 a management program to identify and implement best management practices to reduce NPS pollutant loadings. 33 U.S.C. 1329(b)(2)(A), NRDC, 915 F.2d at 1318. Section 319 also required States to submit a one-time assessment report identifying waters not expected to achieve or maintain WQS because of NPS pollution, sources responsible for the pollution, and existing programs for controlling NPS pollution. 33 U.S.C. 1329(a)(1). Additionally, CWA Section 208 directed States to draft plans including procedures for identifying NPS pollution and establishing best management practices to control

^{7/} In addition to technology-based effluent limitations, permits for point source dischargers must also incorporate any more stringent effluent limitations necessary to meet these WQS. 33 U.S.C. 1311(b)(1)(C). See NRDC, 915 F.2d at 1317.

^{8/} Under CWA Section 504, however, EPA may bring a civil action to restrain any polluter, regardless of source, from acts presenting an "imminent and substantial endangerment" to human health or welfare. 33 U.S.C. 1364.

such pollution 33 U S C 1288(b)(2)(F)

C Development of the TMDL Program

1 **The Importance of NPS Pollutants.** The legislative history of Section 303(d) demonstrates that Congress recognized in 1972 “that non-point sources of pollution are a major contributor to water quality problems ” H R Rep No 92-911, at 105-06 (1972) As the district court noted, pollution from NPS “has become the dominant water quality problem in the United States, dwarfing all other sources ”” 91 F Supp 2d at 1338 (quoting Houck, TMDLs, Are We There Yet. The Long Road Toward Water-Quality Based Regulation under the Clean Water Act, 27 ELR 10391, 10399 (Aug 1997)) The principal sources of non-point source pollution include “agriculture, silviculture, mining, construction, and urban runoff.” Diane K Conway, TMDL Litigation. So What Now?, 17 Va Env'tl L J 83, 92 (1997)

The impacts of NPS pollution can be severe See Rodgers at 293 Among other effects, pollution from NPS, notably including agriculture and logging, has been identified as a prime cause of the declines of river fisheries, including endangered species of anadromous fish See, e.g., 61 Fed Reg 56,138, 56,141 (Oct. 31, 1996) (Endangered Species Act listing coho salmon); 64 Fed Reg 50,393, 50,414 (Sept 1999) (chinook salmon), 65 Fed Reg 6960, 6964 (Feb 11,

2000)

NPS pollution is a prominent cause of nonattainment of WQS. Pursuant to CWA Section 303(d), California has identified 509 water segments, including rivers, beaches, lakes, bays, estuaries and wetlands, that do not meet applicable WQS. Of these, over half (54 percent) are impaired by NPS only, 45 percent are impaired by a combination of point and NPS; and only one percent are impaired solely by point source pollution ^{2/}

2 Regulatory History

a TMDLs and Nonpoint Sources EPA first promulgated regulations implementing Section 303(d)(1)'s listing and TMDL provisions in November 1975. See 40 Fed. Reg. 55336 (Nov. 28, 1975), 40 CFR Parts 130, 131 (1976). These early regulations set forth the necessary elements of State water quality management plans, requiring lists of impaired and non-impaired waters and TMDLs. They did not limit lists and TMDLs to waters impaired by point sources and did not exempt waters impaired by NPS. Regarding lists, the regulations

^{2/} Joint Statement of Undisputed Facts for Defendants' Motion for Summary Judgment at 2 (Doc. 93) ("According to EPA's analysis of California's 1998 Section 303(d) List, 54% of the State's waterbodies on the List are impaired by nonpoint sources only, 45% are impaired by a combination of point and nonpoint sources; and 1% are impaired by point sources only.")

provided that States' water quality management plans were required to include, inter alia, (1) an "assessment of existing and potential water quality problems within the approved planning area * * *, including an identification of the types and degree of problems and the sources of pollutants (*both point and nonpoint sources*) contributing to the problems", (2) "[t]he classification of each segment as either water quality or effluent limited as defined in § 130.2(o) of this chapter,"^{10/} and that (3) "[e]ach water quality segment classification shall include the specific water quality parameters requiring consideration in the total maximum daily load allocation process " 40 C F R 131 11(b) (1976) (emphasis added) (FSER 186).

NPS were included in TMDL allocation under the early regulations. "For each water quality segment," water quality management plans were to include "the total allowable maximum daily load of relevant pollutants during critical flow conditions for each specific water quality criterion being violated or expected to be violated," and had to be "established at levels necessary to achieve compliance with applicable [WQS]," (FSER 187), and had to include "*a total allocation for point*

^{10/} The regulations defined a "segment" as surface waters with "common hydrologic characteristics," and placed all segments in two categories "water quality segments," in which WQS were not expected to be attained after application of required effluent limitations, and "effluent limitation segments," in which WQS will be satisfied after application of effluent limitations 40 C F R 130 2(o) (1976)

sources of pollutants and a gross allotment for non-point sources of pollutants”

40 C F R 131.11(f)(1)(i), 40 C F R 131.11(f)(3) (emphasis added) (FSER 187)

On December 28, 1978, EPA announced its conclusion pursuant to CWA Section 304(a)(2)) that “[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads.” 43 Fed. Reg. 60662, 60665 (Dec. 28, 1978). EPA’s regulations did not (and still do not) make any distinction between pollutants associated with point sources and NPS. See 40 C.F.R. 130.7(c)(1)(ii) (1999) (“TMDLs shall be established for all pollutants preventing or expected to prevent attainment of [applicable] WQS[]”)

EPA again addressed TMDLs in 1979 regulations regarding grants for water quality management planning. 43 Fed. Reg. 40742. The regulations directed States to “carry out an ongoing assessment of the location and nature of its *point and nonpoint water quality and source control problems*” and required them to include in the assessment “classification of stream segments in accordance with section 303(d)(1)(A) of the Act,” an “evaluation of the effectiveness of existing point source and nonpoint source control programs in achieving water quality goals,” and a “*determination of the relative pollutant loading attributable to point and nonpoint sources*.” 40 CFR 35.1511-1(d)(2),(3),(4), 44 Fed. Reg. 30015, 30028 (May 23, 1979) (emphases added).

EPA proposed TMDL regulations in 1982, 47 Fed Reg 46668 (Oct 19, 1982), which were published in final form in 1985 50 Fed Reg 1774 (Jan 11, 1985) (40 CFR Part 130). These regulations, with some amendments in 1992, are still in effect, and expressly require States to establish, as part of their TMDLs for substandard waters, both wasteload allocations (applicable to point sources, 40 C F R 130.2(h)) and “load allocations,” defined as “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources,” 40 C F R 130.2(g). Similarly, the regulations require States to list and prioritize water quality segments for which WQS would not be satisfied through the application of “technology based effluent limitations” required under the CWA, together with any more stringent effluent limitations required by State or federal law, and “[o]ther pollution control requirements (e.g., best management practices) required by local, State, or Federal authority.” 40 C F R 130.7(b)(1) ^{11/}

EPA’s consistently held interpretation that NPS are included in the Section 303(d)(1) and 303(d)(2) listing and TMDL processes is further reflected in a series

^{11/} Best management practices are defined as “[m]ethods, measures or practices selected by an agency to meet its nonpoint source control needs.” 40 C.F.R. 130.2(m)

of administrative guidance documents. See, e.g., Technical Guidance Manual for Performing Waste Load Allocations at 3-110 (1983) (FSER 196) (for purposes of writing allocations “the sources may be combinations of point and nonpoint sources or exclusively point or nonpoint sources”), Guidance for Water Quality-Based Decisions: the TMDL Process at 2 (1991) (FSER 78) (“A TMDL should be developed and appropriate control actions taken on *all* pollution sources”, “the TMDL can be used to establish load reductions where there is impairment due to nonpoint sources”) (emphasis added), Supplemental Guidance on Section 303(d) Implementation at 2 (1992) (FSER 112) (303(d) process “applies equally to segments affected by point sources only, a combination of point and nonpoint sources, and nonpoint sources only”), Guidance for 1994 Section 303(d) Lists at 1 (1993) (FSER 117) (“The section 303(d) list provides a comprehensive inventory of waterbodies impaired by all sources, including point sources, nonpoint sources, or a combination of both”), Water Quality Standards Handbook at 7-7 (1994) (FSER 19) (a “allocates allowable loads to the contributing point and nonpoint source discharges”), New Policies for Establishing and Implementing Total Maximum Daily Loads, ER Tab 7 at 5 (1997) (“Implementation of load allocations for nonpoint sources * * * is essential”), National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions, ER Tab 20 at 6 (1997) (“Consistent

with long-standing EPA policy, regulations, and practice, States should include waterbodies impaired by nonpoint sources alone[]”). Moreover, EPA has consistently applied these policies and regulations in many listing decisions under Section 303(d)(1)(A), as well as the approval of NPS load allocations in numerous TMDLs, including the decisions and calculations that gave rise to the claims in this case. See FSER 136-138.

b. Delays in Implementing the Entire TMDL Program. Congress required States, within 120 days of the enactment of the 1972 Act, to include TMDLs as part of their proposed continuing planning process submissions to EPA. See Section 303(e)(2), (e)(3)(C), 33 U.S.C. 1313(e)(2), (e)(3)(C). However, the TMDL program encountered substantial delays. See generally Oliver A. Houck, supra, 27 Env'tl. L. Rep. 10391, 10392-10398 (Aug. 1997) ^{12/}. After EPA listed TMDL-eligible pollutants in 1978, States moved slowly in meeting their Section 303(d) obligations. See id. at 10393 (“A few States submitted a few lists. Most States submitted nothing at all.”), Alaska Center for the Environment, 20 F.3d at 983 (“The record before the district court showed that the State of Alaska had never

^{12/} As the district court noted, the legislative history to the 1972 Act contained evidence that Congress wished EPA to give “top priority” to the technology-based effluent limitations, making WQS a “secondary priority.” 91 F.Supp.2d at 1353 (quoting Senator Muskie).

submitted any TMDLs to the EPA, and that the EPA had done nothing to establish any TMDLs ”) Delays in implementation led to a series of court decisions holding that EPA was obligated to act after prolonged delays by a State E.g., Scott v. City of Hammond, 741 F 2d 992 (7th Cir 1984) ^{13/} Another round of lawsuits resulted in court orders obligating EPA to expedite implementation of the TMDL program. See, e.g., Idaho Sportsman’s Coalition v. Browner, 951 F Supp 962 (W D Wash 1996), FSER 135 See also Houck, 27 Env’tl L Rep at 10396-97 (stating that TMDL process did not “begin” until 25 years after enactment) .

c The Garcia River Listing and TMDL Development. In 1992, California submitted its 303(d) list waters to EPA ER Tab 86 at 2. EPA partially disapproved the list because the State did not list the Garcia River and 16 other North Coast rivers, all but one of which failed to meet WQS due to pollution solely from NPS Id. at ¶¶ 2-3 ^{14/} EPA established a new list for California, adding

^{13/} See also, e.g., Alaska Center for the Environment v. Reilly, 20 F 3d 981 (9th Cir 1994), prior ruling on liability, 762 F.Supp 1422 (W D Wa.1991) In 1989, the General Accounting Office issued a report finding that the TMDL program had not yet been effectively implemented Water Pollution More EPA Action Needed to Improve the Quality of Heavily Polluted Waters (Jan 1989)

^{14/} In the course of preparing this brief, the federal appellees learned that, in 1999, California’s State Water Board issued a “general” NPDES permit to the California Department of Transportation regulating stormwater discharges from state highways as a permitted point source There are state highways in the Garcia River

(continued...)

these waterbodies. Id. at ¶¶ 4-5. California's subsequent lists included these rivers, id. ¶ 8, but the State did not develop TMDLs for them.

EPA entered into a consent decree in Pacific Federation of Fishermen's Associations v. Marcus, No. 95-4474 (N.D. Cal.), requiring the Agency to guarantee that TMDLs would be developed for the North Coast rivers. ER Tab 91, Att. 1 at 6. The State developed a draft TMDL for the Garcia, but did not submit a final one by the consent decree deadline. Thus, EPA established its Garcia TMDL on March 16, 1998. ER Tab 86 at 3. EPA's TMDL establishes a maximum sediment load at an average of 552 tons per square mile per year, and allocates this total among various categories of NPS, including mass wasting (landsliding) associated with roads, mass wasting from timber harvesting, and erosion from road surfaces. Ibid. The TMDL identifies a sixty percent reduction in sediment loadings, compared to historic levels, as necessary to achieve WQS. Ibid. If California subsequently submits its own TMDL and EPA approves it, then California's TMDL would become the operative TMDL for the Garcia River. ER

¹⁴/ (. continued)

watershed. EPA does not presently have any information which would indicate that any discharge related to these state highways contributes to the impairment of the Garcia River. In the district court, the parties stipulated that the Garcia is impaired only by NPS. See ER Tab 86 at 2.

3 The Pronsolinos' Timber Harvest Permit In 1998, the Pronsolinos applied to the California Department of Forestry ("CDF") for a permit to harvest timber on their land in the Garcia watershed. Under State law, CDF is charged with ensuring that timber harvesting does not have a significant effect on the environment. See, e.g., 14 C C R. 898.1(c)(1), 916.3. Thus, timber harvest permits often include site-specific mitigation measures to protect water quality. In processing their permit application, CDF required that the Pronsolinos explain how they were taking the Garcia River TMDL into account. ER Tab 86 at 7. CDF, after consulting with California's Regional Water Quality Control Board ("RWQCB"), granted the Pronsolinos a permit containing provisions designed to reduce sediment loads associated with road building and maintenance, tree removal, and other timber harvesting activities. Id. The Pronsolinos did not object to these

^{15/} California is in the process of developing its own TMDL for the Garcia River. The North Coast RWQCB adopted a basin plan amendment including a State-developed TMDL for the Garcia River on May 28, 1998 (resolution 98-66), and made corrections on December 10, 1998, the State Water Quality Control Board approved it (with clarifications) on September 21, 2000 (resolution 2000-070). The State informs EPA that it expects the State TMDL to be submitted to the State's Office of Administrative Law ("OAL") in November 2000. If OAL approves the amendment, it will then be submitted to EPA. If EPA approves the State's TMDL, it will supersede the TMDL established by EPA in March 1998.

conditions during the State permitting process, and did not seek an administrative appeal

D District Court Proceedings

1 Plaintiffs' Allegations. The Pronsolinos and various agricultural organizations filed this suit to “set aside, enjoin and declare unlawful the defendants’ unauthorized regulation of nonpoint sources contrary to Section 303(d) of the Clean Water Act ” Complaint ¶ 1 (Doc 1) They contended EPA lacked authority to list the Garcia River under Section 303(d)(1), and had “exceeded [its] authority under the Clean Water Act by regulating nonpoint source activities through the Garcia River TMDL.” *Id.* ¶ 63-84 Two timber trade groups intervened in support of plaintiffs, fishermen’s and environmental groups, as well as the Association of Metropolitan Sewerage Agencies (representing many CWA point source dischargers), intervened in support of EPA The State of California filed amicus briefs supporting EPA

2 The District Court’s Decision. On March 30, 2000, the district court granted summary judgment for defendants and issued a comprehensive opinion The court rejected “all versions” of plaintiffs’ argument, including their original broad contention that Section 303(d) dealt ““exclusively”” and ““solely”” with point sources, and the modified position in their reply brief that “blended”

waters polluted by both point and nonpoint sources had to be listed under Section 303(d), but that waters polluted only by NPS “should not be listed and no TMDL should be prepared ” 91 F Supp 2d at 1346 (quoting and summarizing plaintiffs’ summary judgment briefs).

The court found plaintiffs’ arguments “inconsistent with the logic expressed in Section 303(d),” which turns on water quality (not pollution sources) and which requires that standards be established and “implemented” for all waters. Id. at 1347 Section 303(d) requires that TMDLs be set so as to “implement” WQS, which would be “impossible” to achieve “without taking NPS into account ” Id. It also reasoned that the “statutorily-defined role of the TMDL” supported EPA’s position TMDLs were not only intended to serve as the basis for adjusting NPDES permits for point sources, but Congress had “expressly contemplated” that TMDLs be incorporated in the Section 303(e) continuing planning process – a process that covers non-point as well as point sources Id. (quoting Section 303(e)) The court further noted that this Court had “already gone on record that the TMDL process covers nonpoint as well as point sources,” and that the legislative history demonstrated that Section 303(d) was intended to “result in a plan and TMDL for

every substandard water within a State ” Id. at 1347 (citing cases), 1351 ^{16/}

Finally, the district court concluded that plaintiffs’ repeated contentions that EPA had sought to “regulate” NPS rested on mischaracterizations of EPA’s position and the TMDL program 91 F Supp 2d at 1355. The court noted that EPA itself agreed that Section 303(d) does not “regulate State land-use practices ” Id. The CWA did not obligate the State to translate nonpoint source load allocations “uncritically and mechanically” to particular tracts of land, and the State remained “free to modify the TMDL reductions, or even refuse to implement them, in light of countervailing State interests ” Id. The court also noted that landowners “can appeal unreasonable or unauthorized restrictions within the State administrative system,” and challenge a particular TMDL approved or established by EPA under the APA Id.

^{16/} The court (91 F. Supp 2d at 1351) considered and rejected the possibility (not raised by plaintiffs) that the term “pollutant” in Section 303(d)(1) is restricted to material from point sources. The court noted that sediment is a CWA “pollutant,” citing Rybachek v. EPA, 904 F.2d 1276, 1285-86 (9th Cir 1990), and Idaho Conservation League v. Thomas, 91 F 3d 1345, 1347 (9th Cir 1996), and that numerous provisions of the CWA demonstrate that pollutants can “derive from any source, not merely from point sources,” 91 F Supp 2d at 1352. See FSER 198-200.

SUMMARY OF ARGUMENT

EPA has consistently construed Sections 303(d)(1) and 303(d)(2) to require listing of, and establishment of TMDLs for, all waters that cannot be brought into conformity with applicable WQS through the use of technology-based effluent limitations – whether the pollutant in the substandard waters comes from point sources, NPS, or a combination of the two. That construction accords with the plain language, structure, and purposes of the CWA, and is entitled to deference.

EPA's view that Section 303(d)'s requirements apply without regard to the sources of pollutants in substandard waters is consistent with the water quality-based approach Congress adopted throughout Section 303. Such standards, by nature, do not turn on the source of pollution. Even Appellants agree that, in Sections 303(a) and 303(b), Congress required the States to establish WQS for *all* waters, regardless of pollution source. In Section 303(d)(1), Congress directed the States to identify all waters where technology-based effluent limitations were insufficient to bring those waters into attainment with WQS. Sections 303(d)(1)(C) and 303(d)(2) then require the States to establish TMDLs at a level necessary to “implement” the WQS in question. EPA's reading of Section 303(d), unlike Appellants', gives effect to that express requirement.

Appellants' competing reading of the statute is not plausible. They fail to

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identify any language in the Act that requires or even authorizes States to refuse to list (or to establish TMDLs for) substandard waters because pollution from NPS is the cause of noncompliance with WQS, nor do they demonstrate that Congress intended to divorce Subsection 303(d) from the structure and purposes of Section 303 as a whole. Nowhere does the statute say, as Appellants now suggest, that TMDLs need *not* be established for some category of substandard waters, or that TMDLs may be set at levels that are insufficient to implement WQS for substandard waters.

Appellants' contention that the EPA's application of the TMDL provisions to waters impaired by NPS is an innovation of the early 1990s would not be a fatal flaw even if it were true, but it is not true. Appellants simply ignore earlier EPA regulations and guidance that directly refutes their contention. The Court should reject Appellants' attempt to turn EPA's and States' delays in implementing the TMDL program as a whole into a basis for scaling back the program's application to NPS. Appellants' contentions concerning the impacts of the program on State authority rest on mischaracterizations of the TMDL program itself and how it applies to NPS.

STANDARD OF REVIEW

This Court's review of the summary judgment is de novo, like the district court, this Court must assess the challenged agency action under the standards set forth in the APA, 5 U.S.C. 706. E.g., Swanson v. U.S. Forest Service, 87 F.3d 339, 343 (9th Cir. 1996).

Appellants do not challenge the technical soundness of the Garcia River TMDL, see 91 F Supp 2d at 1355, and do not challenge its particular components as arbitrary or capricious. Instead, they broadly challenge EPA's authority to establish the TMDL as foreclosed by the CWA's plain language. It is a "dominant, well-settled principle of federal law" that reviewing courts must accord deferences' to federal agencies' interpretations of statutes Congress has charged them with administering. See National Railroad Passenger Corp. v. Boston & Main Corp., 503 U.S. 407, 417 (1992) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). This principle mandates that

"if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A., [467 U.S.] at 843. If the agency interpretation is not in conflict with the plain language of the statute, deference is due.

National Railroad Passenger Corp., 503 U.S. at 417-418 (other citations omitted)

See also Arkansas v. Oklahoma, 503 U.S. 91, 105-107 (1992); Dioxin, 57 F.3d at

The rule of deference is based on institutional fundamentals concerning the relationship between Congress, Executive agencies, and the courts. See Chevron, 467 U.S. at 843-44, 865, Morton v. Ruiz, 415 U.S. 199, 231 (1974). ““To sustain [an agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.”” Udall v. Tallman, 380 U.S. 1, 16 (1965) (citation omitted). Furthermore, a “longstanding interpretation placed on a statute by an agency charged with its administration,” is entitled to “great weight.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

ARGUMENT

I THE CWA'S TEXT, STRUCTURE, PURPOSE AND HISTORY SUPPORT EPA'S VIEW THAT SECTIONS 303(d)(1) AND 303(d)(2) APPLY TO WATERS IMPAIRED BY NON-POINT SOURCES

EPA's interpretation of Section 303(d)(1) accords with the statutory "language itself, the specific context in which that language is used, and the broader context of the statute as a whole " Robinson v. Shell Oil Co., 519 U S 337, 341 (1997)

A. Section 303(d) Subjects All Substandard Waters to TMDLs Regardless of the Source of the Pollutants.

EPA has consistently construed Sections 303(d)(1) and 303(d)(2) to require the States to list, prioritize, and establish TMDLs if the effluent limitations required in Sections 301(b)(1)(A) and 301(b)(1)(B) are insufficient to bring such waters into attainment with their WQS Supra, pp 18-20 That construction is consistent with the text, structure and purposes of the Act

The plain language and structure of Section 303(d) demonstrate that Congress did not intend to exclude waters impaired by NPS

Each 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 WQS applicable to such waters

33 U S C 1313(d)(1)(A) By its terms, this provision does not exclude from the

303(d) list waters impaired by NPS. Any water (whether impaired by point sources, NPS, or both) may fail to meet applicable WQS if the effluent limitations in Section 301(b)(1) are insufficient for that task.

This Court has sustained EPA's view that the effluent limitations referenced in Section 303(d)(1)(A) do not confine the scope of Sections 303(d)(1) and 303(d)(2) to waters where technology-based controls have been applied and found inadequate to achieve WQS. In Dioxin, 57 F.3d 1517, this Court upheld a TMDL for the Columbia River upon challenge by pulp mills and environmental groups. Like Appellants here, the pulp mills argued "that the 'plain language' of [Section 303(d)] prohibits EPA from developing TMDLs prior to the proven failure of technology-based limitations." 57 F.3d at 1526. This Court rejected that argument, holding that "EPA's interpretation is reasonable and not contrary to congressional intent," and observing that "[n]owhere does the Act prohibit the EPA from listing waters as impaired and implementing TMDLs for toxic pollutants pursuant to § 1313(d)." Id. at 1527-28.

In the same way, nowhere does the Act prohibit EPA from listing and establishing TMDLs for NPS impaired waters pursuant to Section 303(d)(1). The application of the technology-based limitations identified in Section 303(d)(1)(A) is not a condition precedent to Section 303(d) listing. Consistent with the relationship

between the water quality-based and technology-based approaches, Congress' reference to effluent limitations in Section 303(d)(1)(A) established such technology-based limitations on point sources as a first line of defense against substandard water quality. Contrary to Appellants' suggestion, that reference was not intended *to limit the category of waters that had to be identified under Section 303(d)(1)*.^{17/}

B. The Act's Placement of the TMDL Provisions in Section 303 Demonstrates That TMDLs Are Part of a Water Quality-Based Approach that Accounts for All Sources of Pollutants.

Congress' placement of the TMDL provisions in Section 303 of the Act, which is entitled "WQS and Implementation Plans," demonstrates that Congress intended TMDLs to be part of a water quality-based approach that, by its very nature, is not limited to particular types of sources. Under the water quality-based approach, EPA and the States "work backward from an overpolluted body of water and determine which entities were responsible." NRDC, 915 F.2d at 1316. As a component of the water quality-based approach, the TMDL process must account

^{17/} As the district court in Dioxin explained, the CWA contains "no explicit mandate that technology-based restrictions be imposed as a prerequisite to water quality based-limitations such as a TMDL," and such a reading would "conflict[] with the overall statutory scheme and goals." Dioxin/Organochlorine Ctr. v. Rasmussen, No C93-330, 1993 WL 484888 *3 (W.D. Wash., August 10, 1993), aff'd, 57 F.3d 1517.

for both point and nonpoint sources of pollution. As explained in EPA's Standards Handbook "The TMDL process is a rational method for weighing the competing pollution concerns and developing an integrated pollution reduction strategy for point and nonpoint sources. The TMDL process allows States to take a holistic view of their water quality problems from the perspective of instream conditions."

FSER 19

Numerous courts have examined the language of Section 303(d) and recognized the "comprehensive" and "integrated" characteristics of the TMDL process as part of the overall water quality-based approach^{18/}. As one district court has explained,

The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with pollution from other NPS. States are then required to take whatever additional cleanup actions are necessary, which can include further controls on both point and nonpoint pollution sources.

Alaska Ctr. for the Env't v. Reilly, 762 F.Supp. 1422, 1424 (W.D. Wash.

1991)(emphasis added)(footnote omitted). On appeal, this Court observed that

^{18/} See Friends of the Wild Swan v. EPA (unpublished, CV 97-35-M-DWM, slip. op. at *4 (D. Mont. Nov. 5, 1999) (FSER 31); Idaho Sportsmen's Coalition v. Browner, 951 F.Supp. 962, 966 (W.D. Wa. 1996), Sierra Club v. Browner, 843 F.Supp. 1304, 1311 (D. Minn. 1993), NRDC v. Fox, 909 F.Supp. 153, 156 (S.D.N.Y. 1995).

“Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving WQS in waters impacted by NPS pollution ” Alaska Ctr. for the Env't v. Browner, 20 F.3d at 985 See also Dioxin, 57 F.3d at 1520 (“[A] TMDL represents the cumulative total of all * * * loading attributed to NPS, natural background sources, and * * * the total load allocated to individual point sources ”)

C. Sections 303(d)(1)(C) and 303(d)(2) Require That TMDLs Be Established at Levels “Necessary to Implement the Applicable WQS,” Which Is Not Possible Without Addressing Impairments Caused By NPS.

EPA’s view that the Section 303(d) listing and TMDL obligations do not depend upon the source of pollution in substandard waters accords with the express legislative purpose set forth in that provision ensuring that TMDLs are set at levels that will implement the WQS Section 303(d)(1)(C) provides that “loads” (i.e., TMDLs) “shall” be established “*at a level necessary to implement the applicable WQS.*” 33 U.S.C. 1313(d)(1)(C) (emphasis added) Accord 33 U.S.C. 1313(d)(2) (if EPA disapproves a State TMDL, the Administrator must “establish such loads for such waters as [the Administrator] determines necessary to implement the WQS applicable to such waters”)

It is *undisputed* that, under Sections 303(a) and (b), WQS must be in place

for all waters within a State 33 U S C 1313(a), (b). See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U S 700, 704 (1994) (observing that CWA requires that States establish WQS “for all intrastate waters”) ^{19/} These central features of Section 303 -- WQS for all waters, coupled with a command to establish TMDLs at levels necessary to “implement” those standards -- demonstrate why EPA is correct to interpret Section 303(d) to require listing and TMDL development for all substandard waters, irrespective of pollution source. As noted above, the number of polluted waters that are impaired only by point sources has been and is extremely small, and is dwarfed by the number of waters polluted only by NPS or by both point sources and NPS. Supra, p 15 & n 9. As the district court put it “Since all rivers and water regardless of pollution source were included in the universe for which water-quality standards were required, all of them – again regardless of source of pollution – were included in the universe for which listing and TMDLs were required – save and excluding only those for which effluent limitations would be adequate to achieve compliance with standards ” 91 F Supp.2d at 1347 (footnote omitted)

^{19/} As the district court noted, “[a]ll parties agree” that the WQS required under Section 303 “plainly applied to waters polluted by point sources as well as non-point sources, either alone or in combination ” 91 F.Supp.2d at 1343

Furthermore, for a large proportion of substandard waters, it would not be possible to implement WQS unless the TMDLs addressed pollutant loads from NPS. As a leading commentator on the CWA has put it, if NPS were not included, “a process to ensure that municipal and industrial limits were ‘consistent with water quality standards’ would make no sense, it literally could not be done.” Oliver A. Houck, TMDLs, The Resurrection of WQS-Based Regulation Under the Clean Water Act, 27 Env’tl L. Rep. 10329, 10337 n.100 (1997). Omitting NPS, moreover, would be inconsistent with the “comprehensive approach” established in the 1972 Act. See Pronsolino, 91 F. Supp. 2d at 1347, National Resources Defense Council, Inc. v. Fox, 909 F. Supp. 153, 156 (S.D.N.Y. 1995).

These practical realities were not lost on Congress. The House Committee Report on the bill that introduced Section 303(d) plainly recognizes that point source controls alone would be inadequate to implement applicable WQS.

Any required more stringent effluent limitations will be set on the basis of that reduction in the quantity and quality of the discharge of pollutants which would be required to make the total discharge load in the receiving waters from municipal and industrial sources consistent with WQS. This should not be interpreted to mean that such more stringent industrial and municipal effluent limitations will, in themselves, bring about a meeting of WQS for receiving waters. The Committee clearly recognizes that non-point sources of pollution are a major contributor to water quality problems.

H.R. Rep. No. 92-911, at 105-06 (1972) (emphasis added). As Professor Houck

explains

It is logical that the committee report describes only municipal and industrial sources as needing additional "emissions limitations" because these are the only sources directly subject to emissions limitations under the Act. The committee goes on to recognize, however, that WQS were also violated by [NPS] in a "major" way. *This sentence implies the obvious: there is no way to determine the appropriate contributions from, and limitations on, municipal and industrial point sources without considering these [NPS] as well.* How a State would choose to allocate its limits among point and [NPS] contributors would, at least in the first instance, be up to States to decide.

Houck, 27 Env'tl L. Rep. at 10337 n.100 (emphasis added). Clearly, then, Congress intended that all substandard waters be listed under Section 303(d) and that their TMDLs account for both point sources and NPS, so that all applicable WQS would be implemented.

II EVEN IF SECTION 303(d) IS AMBIGUOUS, EPA'S CONSTRUCTION OF THE STATUTE IS PERMISSIBLE.

As the district court concluded, 91 F. Supp. 2d at 1346-47 & n.12, 1356, EPA's construction of Section 303(d) accords with the CWA's plain language, statutory purposes, and structure, so that no further inquiry is required under Chevron. EPA's view that Sections 303(d)(1) and 303(d)(2) apply to all substandard waters, without regard to pollution source -- and only that view -- accords with the mandate of Section 303 making WQS applicable to all waters,

without regard to pollution source, and with the express language in Sections 303(d)(1) and 303(d)(2) making “implementation” of those standards (again without distinguishing by pollutant source) the ultimate goal of TMDL establishment. As noted, the elaborate distinctions Appellants would draw between the disparate regimes allegedly governing “PS-only” waters, “NPS-only” waters, and “blended” waters have no basis in the statute. As we discuss below, there are prohibitive logical and practical problems with Appellants’ competing interpretations of the statute.

Even if there were room for alternative readings of Section 303(d)(1), EPA’s construction easily meets the standard of reasonableness established by Chevron and its progeny. (In this regard, it is notable that neither group of Appellants acknowledges that the Chevron standard applies.) Because EPA has given Section 303(d) “the same reading, consistently, from the issuance of the first regulations,” Houck, 27 Env’tl L. Rep. at 10400, the Agency’s construction is entitled to “great weight,” Bell Aerospace Co., 416 U.S. at 275. See also Pronsolino, 91 F. Supp. 2d at 1354 n.17.

This case does not require the Court to determine the “Agency’s statutory obligations,” but instead to determine the “Agency’s statutory authority.” Arkansas v. Oklahoma, 503 U.S. 91 (1992) (emphasis in original). “Even if the Clean Water

Act itself does not require” that EPA apply Section 303(d) as it has here, the statute “clearly does not limit the EPA’s authority” to do so Id. See Dioxin, 57 F 3d at 1528 (discussing Arkansas and upholding EPA’s exercise of authority to address NPS under Sections 303(d)(1) and 303(d)(2)) EPA’s interpretation of Section 303(d) is a “reasonable exercise of the Agency’s substantial statutory discretion.” Arkansas, 503 U S at 107

III. APPELLANTS’ COMPETING INTERPRETATION IS UNSUPPORTED BY THE LANGUAGE OF SECTION 303(d) AND WOULD CONFLICT WITH ITS PURPOSES.

Under Chevron, it is not necessary for EPA to demonstrate that a competing interpretation of the CWA urged by other parties is inconsistent with the statutory text or unreasonable, but only that the agency’s own reading is “reasonable” and not “clearly contrary to the intent of Congress.” Dioxin, 57 F 3d at 1525 (citing Chevron, 467 U S at 842-44) As demonstrated below, however, Appellants’ competing construction of Section 303(d) is itself clearly inconsistent with the text and purposes of Section 303(d), further undermining their contention that EPA’s interpretation is unlawful

A Appellants’ Proposed Construction of Section 303(d) Does Not

Undermine EPA's Interpretation.

Appellants principally contend that the reference to “effluent limitations” in Section 303(d)(1)(A) means that Congress did not intend TMDLs to apply to waters impaired only by NPS. See Opening Brief of Plaintiffs-Appellants (“Br”) 22-29. Appellants, however, ascribe to Congress an implausibly roundabout way of saying so. Had Congress intended to limit the listing and TMDL development requirements of Sections 303(d)(1) and 303(d)(2) to point sources, it could have said precisely that ^{20/}

But in Section 303(d) Congress did not draw a distinction between point and non-point sources, or between the kinds of substandard waters (e.g., “NPS-only impaired,” “blended”) that Appellants contend appears on the face of the statute and that is critical to their interpretation. To the contrary, Congress required that (1) WQS must cover all waters, regardless of the source of pollution, and (2) the States must establish TMDLs at levels necessary to ensure that those standards are “implemented.” Congress cannot have meant the reference to “effluent limitations”

^{20/} Congress did just that in CWA Section 304(l)(1)(B), which requires States to submit to EPA “a list of all waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or *substantially to discharges from point sources of any toxic pollutants* listed pursuant to section 1317(a) of this title” (emphasis added)

in Section 303(d)(1)(A) to have the jurisdictional narrowing role Appellants ascribe to it, for under that interpretation this second requirement could not be met with respect to a very substantial number of waters. Instead, as the district court noted, the reference to “effluent limitations” was included because the water quality-based approach was intended to serve as a backstop to the technology based-approach that Congress introduced in the 1972 Act. If the new approach “alone would bring a waterway into compliance with standards, well and good. If not, then Section 303(d)(1) required the waterway to join a list of unfinished business.” 91 F Supp 2d at 1343 (footnote omitted). Appellants’ position, if accepted, would render that important back-up measure inapplicable to a large proportion of waters that are not meeting WQS.

Appellants find great significance in Section 303(d)(1)’s reference to Sections 301(b)(1)(A) and 301(b)(1)(B), which require “best practicable technology” (“BPT”) as the basis for the first generation of technology-based effluent limitations, as opposed to more stringent effluent limitations, such as “best available technology” (“BAT”). In an argument raised for the first time on appeal, they claim that this reference “reveals the real purpose of TMDLs – to spur whatever additional measures are necessary to bring those [point source]-polluted waters up to standard” and “requires identification only of waters for which the

undemanding BPT is not stringent enough ” Br 22 But this “purpose” is entirely of Appellants’ devising Their reading of the references to BPT as limiting the class of substandard waters subject to listing and TMDLs under Sections 303(d)(1) and 303(d)(2) is implausible and unsupported, and it would have bizarre consequences

Section 301 of the 1972 Act called for BPT to be in place by July 1, 1977, and that BPT-based effluent limitations for point sources would be replaced by the stricter BAT-based effluent limitations by July 1, 1983 (later changed to March 31, 1989) See Sec 301(b), 86 Stat 845 (1972), codified as amended at 33 U S C 1311(b) See du Pont, 430 U S at 121 These provisions undermine Appellants’ contention that the reference to BPT in Section 303(d)(1) was intended to limit the category of substandard waters subject to listing and TMDL establishment. While Congress expressly stated that BPT was to be replaced by BAT-based limitations by 1983, there is no sign that the same Congress intended the listing and TMDL provisions of Section 303(d) to be in place only for that statutorily limited period of time Indeed, there is evidence to the contrary, since Section 303(d)(2) provides (and has since 1972) that States shall submit their lists and TMDLs to EPA “from time to time ” 33 U S C 303(d)(2)

Another oddity would follow from construing Congress’ reference to BPT in Section 303(d)(1) as a limit on listing and TMDL establishment If Section

303(d)(1) were read this way, then even if waters had been brought into compliance with WQS by means of the effluent limitations of BAT or other pollution control measures, States would still be required to list the rivers and establish TMDLs whenever BPT alone *would* not have been enough to satisfy WQS. Thus, such a reading of Section 303(d)(1) would compel States to develop TMDLs for waters that already comply with applicable WQS – an approach that would expend substantial public resources, yet serve no identifiable purpose

In the preamble to the 1985 regulations, EPA specifically rejected the view that the references to BPT in Section 303(d)(1) were intended as a roundabout way of setting a ceiling on listing and TMDL requirements:

A strict interpretation of this section would mean that States would have to establish TMDLs for all waters where best practicable control technology currently available (BPT) and second[ary] treatment are not adequate to meet applicable WQS. However, those waters include a number of waters where other legally required pollution controls are sufficient to ensure compliance with WQS

Such examples include best available technology economically achievable (BAT), new source performance standards, pretreatment standards, State or local effluent limitations more stringent than BPT and secondary treatment (under authority reserved by section 510 of the Act), and other required pollution controls, including best management practices (BMP) for [NPS] required by local, State, or Federal authority. Under such circumstances, establishing TMDLs would not contribute to accomplishing the goals of the Act and could draw resources from areas where there are water quality problems. Therefore, EPA believes it best serves the purposes of the Act to

require States to establish TMDLs and submit them to EPA for approval only where such TMDLs are needed to “bridge the gap” between existing effluent limitations, other pollution controls and WQS. TMDLs would be estimated, rather than established, for those waters not covered by this interpretation, in accordance with section 303(d)(3) of the Act.

50 Fed. Reg. at 1775 ^{21/} EPA’s rejection (fifteen years ago) of Appellants’ construction of Section 303(d)(1)(A) was well-founded ^{22/}

Appellants’ position is no more satisfying with respect to “blended” waters. Appellants bury in a highly revealing footnote the assertion that “[w]hether § 303(d)(1) applies to blended waters – those impaired by both PS and NPS pollution – is not at issue in this case,” but that the answer “will be plain” once the Court accepts their position on “NPS-only” waters. Br. 56 n. 10. Appellants proceed to

^{21/} Appellants suggest (Br. 42) that the last sentence of this quotation constitutes a determination by EPA that, for “non- and NPS-only impaired waters,” “TMDLs would be estimated, rather than established.” This suggestion is patently misleading, because (as the full quotation reveals), EPA never excluded “NPS-only” waters from Section 303(d)(1). In the very same passage, moreover, EPA stated that when determining which waters needed TMDLs, States should consider whether WQS could be met through application of required “best management practices (BMP) for NPS” -- an analysis which only makes sense if NPS-impaired waters are in the universe of waters being considered for TMDL development. The resulting regulations likewise apply to both NPS and point source-impaired waters, and provide no support for Appellants’ assertion. E.g., 40 C.F.R. 130.2(f, g, h).

^{22/} A more plausible explanation of Congress’ reference in 303(d) to BPT, as opposed to BAT, is simply that Congress designated BPT as the first generation of technology-based standards. See Section 301(b), 33 U.S.C. 1311(b).

give their own answer that TMDLs must be established for blended waters (because these waters are impaired by at least some point sources of pollution), but that those TMDLs may not be utilized to reduce NPS pollutant loadings to such waters. Id., AFPA Br 11 ²³/

As Appellants would have it, Congress implicitly established a complex scheme under which only a very odd subset of the water bodies with WQS would be subject to TMDLs to implement those WQS – namely, waters polluted by point sources only (as a practical matter, a small fraction of all waters), plus those “blended” waters for which WQS could be implemented solely by reducing discharges of pollutants by point sources via stricter NPDES permit requirements. There is no basis to read such a scheme into Section 303, which by its terms establishes a system of WQS applicable to all waters and then, in Sections 303(d)(1)(A), 303(d)(1)(C) and Section 303(d)(2) repeatedly links identification of waters and establishment of TMDLs to the ultimate goal of “implementing” those

²³/ Appellants’ views on blended waters have shifted throughout this litigation. In their original district court brief, they suggested that blended waters should not be subject to TMDLs (*i.e.*, that Section 303(d) applies only to point sources), but in their reply brief, they restored blended waters to the TMDL universe. See 91 F Supp 2d at 1346 (describing and rejecting “all versions” of appellants’ argument). In their cryptic footnote on appeal (Br 56 n.10), they seem to be arguing that blended waters get a special kind of TMDL which may or may not meet WQS.

standards

Appellants' reading of the statute would make the entire TMDL process established in Section 303(d) both unworkable and largely inadequate to accomplish its congressionally designated purposes. In the great majority of cases, involving either nonpoint-source only waters or "blended" waters impaired by both point and NPS waters, Appellants' approach would render Section 303(d) a rather ineffectual tool to "implement" WQS ^{24/}

Despite Appellants' entreaty (Br. 56 n 10) to ignore these blended-water problems as "not at issue," the Court cannot ignore the logical implications of their position for the entirety of Section 303(d). See 91 F Supp 2d at 1347 (Appellants' interpretation would create "a chasm in the otherwise 'comprehensive' statutory scheme," would "cripple[] the continuing planning process," and would leave "state

^{24/} For example, consider a river where the load of pollutant X necessary to satisfy applicable WQS -- i.e., the TMDL -- is established at 10 units, and which in its current, substandard condition has 20 units of the pollutant coming from a "blend" of point and nonpoint sources. Under Appellants' approach to blended waters -- in which "TMDLs for [blended] waters may be used only to reduce PS pollution" (Br. 56 n 10) -- it will be *impossible* to set a TMDL at a level necessary to "implement" the WQS if the contribution of point sources toward the existing level of 20 units is less than 10 units. For example, if only 9 units of the 20 units of X are from point sources, then under Appellants' interpretation the State could "zero out" the point sources by requiring them to cease all discharges of X but *still* not set the TMDL at a level adequate to implement the WQS.

agencies guessing at how to allocate the burden of cleanup between point and nonpoint contributions of the same pollutant”); Houck, 27 Env'tl. L. Rep. at 10337 n 100 (such a reading of Section 303(d) makes “no sense at all”)

Another odd consequence of Appellants’ reading of Section 303(d) is that, although a substandard water impaired only by NPS would not be listed under Section 303(d)(1) -- no matter how severe the noncompliance with WQS -- the same water would suddenly become subject to the listing and TMDL requirements of Sections 303(d)(1) and (d)(2) whenever there was at least one point source on the river, no matter how minor. This would be so, even though (in Appellants’ view) the resulting TMDL would be merely “informational” as to all but the one point source ^{25/}. It is unlikely that Congress intended the listing of a river, or the establishment of a TMDL, to start or stop based on the happenstance of an individual’s decision to locate a single point source (e.g., stormwater discharges associated with small construction activity, see 40 C.F.R. 122.26(b)(15)) on the

^{25/} In fact, it may be impossible to know the blend of sources until the TMDL is developed. The Garcia TMDL (ER Tab 91, Att. 1 at 24-32) illustrates how complicated a source analysis can be. Appellants’ position would require States to perform this analysis *prior* to listing -- or to abandon TMDLs part-way through, if the analysis indicates that no point sources contribute to the impairment.

water in question ^{26/}

**B Sections 303(d), 208, and 319 Do Not Support Appellants'
Restrictive Reading of Section 303(d)(2)**

Appellants assert (Br 25-31) that three other provisions of the CWA demonstrate that Section 303(d)(1) and 303(d)(2) do not apply to waters polluted by NPS. They point to Section 208, a provision of the 1972 Act requiring States to develop "area-wide waste treatment management plans," to Section 303(d)(3) which requires States to "estimate" TMDLs for waters not on the Section 303(d)(1) list, and to Section 319, a provision added in 1987 that requires States to establish NPS management programs. None of these provisions, however, supports Appellants' contentions.

1 **Section 303(d)(3)** Section 303(d)(3) provides no support for Appellants' effort to narrow the scope of the preceding two paragraphs to point-source impaired waters. Appellants (Br 12) mischaracterize the statutory

^{26/} Appellants also proffer a loose medical analogy (Br 18) in which they appear to be comparing establishing a TMDL for NPS waters to treating a patient with the wrong medicine. The analogy is inapt because it does not faithfully model what Section 303(d)(1) says. Section 303(d)(1) has no counterpart for the two disparate problems ("Virus X" and "Virus Y") posited by Appellants. Instead, Section 303(d) targets a *unitary* problem -- substandard water quality -- to be addressed by two statutory tools: (a) effluent limitations, and (b) if technology-based limitations are inadequate, then TMDLs set at a level to implement applicable WQS.

language when they state “Section 303(d)(3) provides that, for discharges into waters not subject to the effluent limitations specified in section 303(d)(1), States need not establish TMDLs ”

Section 303(d)(3) says *nothing* about NPS or about discharges into waters not subject to effluent limitations. Rather, it applies to waters which a State has not identified under Section 303(d)(1). Like its immediate predecessor paragraphs, Section 303(d)(3) makes no distinction between point sources and NPS. Contrary to Appellants’ suggestion (Br. 13), the lines Congress drew in Section 303(d)(3) have nothing to do with any special technical difficulties in establishing TMDLs for NPS. Indeed, even under Appellants’ theory (Br. 56 n. 10), waters that include at least one point source must be listed under Section 303(d)(1), even if almost all the impairment is due to NPS.

Indeed, Appellants’ account of Section 303(d)(3) as a “NPS” provision is a recent invention. Their initial position in the district court was that “[b]y virtue of the defined terms it uses, Section 303(d) focuses solely on point sources ”

Summary Judgment Br. at 16 (Doc. 85). Nowhere did they suggest that Section 303(d)(3), which specifically contemplates the estimation of a “total maximum daily load,” was intended to deal distinctively with NPS. The provision, as it states, deals only with waters that are not listed under Section 303(d)(1) and provides no support

for Appellants' limited reading of Section 303(d)(1)

2 **Section 208.** Section 208, enacted as part of the 1972 Act and entitled "Areawide Waste Treatment Management," directed the States, among other things, to draft waste treatment plans that include procedures for identifying NPS pollution from various sources, and to establish best management practices to control such pollution. See 33 U.S.C. 1288(b)(2)(F). Section 208 was an additional mechanism for addressing certain forms of NPS pollution, but nothing in its text or history states or implies that it was intended to be the sole mechanism for dealing with such pollution.^{27/} States' plans under Section 208(b)(2)(F) to identify and control, where feasible, "agriculturally and silviculturally related nonpoint sources of pollution" did not depend on whether the pollution in question contributed to exceedances of WQS under Section 303. Furthermore, there is no tension between Section 208's non-regulatory scheme assisting State and local governments' planning efforts with regard to NPS pollution, and establishment of TMDLs for nonpoint-source impaired waters under Section 303(d)(1) and (2). Section 303(d) does not establish a system of direct regulation of NPS. Instead, it

^{27/} Section 208 is not limited to NPS. For example, Section 208(b)(1)(A) requires State plans to identify "treatment works necessary to meet the anticipated municipal and industrial waste treatment needs." 33 U.S.C. 1288(b)(1)(A).

provides the basis for States' efforts (whether through regulatory or voluntary measures) to ensure that WQS for NPS-impaired waters are implemented.

3 **Section 319** Appellants also maintain (Br 29-32) that this Court should ascertain Congress' intent in passing Section 303(d) by looking to Section 319, which was enacted 15 years later. The actions of a subsequent Congress are not a sound basis to determine what the earlier Congress intended. See, e.g., O'Gilvie v. United States, 519 U.S. 79, 90 (1996), Higgins v. Smith, 308 U.S. 473, 479-80 (1940), Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311-12 (9th Cir. 1992).^{28/} To determine Congress' intent in passing Section 303(d), the Court should look to the intent of the Congress that passed Section 303(d)(1)-(3).

Moreover, the presence of Section 319 in the amended Act in no way undermines EPA's longstanding view (which predated the 1987 amendments) that

^{28/} Section 319 does not impliedly repeal Section 303(d). Implied statutory repeal occurs only where (1) two provisions are in irreconcilable conflict or (2) the later enactment covers the whole subject of the former and the intent to substitute is clearly expressed. See In re Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991). Section 319 does not refer to Section 303(d), and does not cover the whole subject of Section 303(d) because (among other things) Section 319 is silent as concerns pollutant loading allocation. The goal of a Section 319 management program is "to reduce pollutant loadings" from NPS, 33 U.S.C. 1329 (b)(2)(A), whereas the goal of a TMDL is to "implement applicable WQS" in particular waterbodies, 33 U.S.C. 1313(d)(1)(C). Far from being redundant, these are distinct and mutually supporting goals.

the listing and TMDL provisions of Section 303(d)(1) and (2) apply to all waters that fail to satisfy WQS. Rather, the two sections work together. Section 319 complements Section 303(d) by providing that States establish NPS management programs and identify “the best management practices and measures which will be undertaken [by the State] to reduce pollutant loadings” from NPS. 33 U.S.C. 1329(b)(2)(A). The State thus may choose from these BMPs and implement those measures (voluntary or otherwise) that are best designed to reduce pollutant loading. Indeed, EPA’s guidance has recognized the key role of Section 319 plans *in implementing TMDLs*. E.g., FSER 86. In addition, the TMDL regulations provide that waters identified by a State pursuant to Section 319 are to be considered “existing and readily available water quality-related data and information” for purposes of assembling 303(d) Lists. 40 C.F.R. 130.7(b)(5)(iv). Thus, Sections 319 and 303(d) provide States with complementary analytic tools and funding to enhance the chances for success of their NPS management programs. Neither provision provides a basis for cutting back the other.

Appellants argue (Br. 31) that Section 319(a)(1)(C)’s reference to reducing NPS pollution “to the maximum extent practicable” somehow demonstrates that Section 303(d)(1) and (2) TMDLs should not be developed for NPS-only impaired waterbodies. This argument, however, is groundless. Neither Section 319(b)

dealing with State NPS management programs nor Section 101(a)(7) articulating Congress's national NPS policy repeat the "maximum extent practicable" limitation emphasized by Appellants. Moreover, Section 319(a)(1)(C) actually refers to a State's description of its current process *for identifying BMPs* to control nonpoint sources and "to reduce, to the maximum extent practicable," NPS pollution. It does not establish requirements for a State's NPS management program under Section 319(b).

Finally, we note that to the extent there is some overlap between Sections 303(d) and 319, that overlap is not unique. Section 303(d), for example, no more conflicts with Section 319's NPS identification, listing, and control provisions than Section 303(d) conflicts with the Act's identification, listing, and control requirements for toxic pollutants under Section 304(l) of the Act. 33 U.S.C. 1314(l). As explained *supra*, this Court in *Dioxin* upheld EPA's development of TMDLs for toxic pollutants. NPS should be treated no differently.

C **This Court's Precedents Do Not Support Appellants' Reading of Section 303(d)**

As the district court noted (91 F. Supp. 2d at 1347-48), although this Court has not decided the "precise issue" raised here, its precedent supports EPA's reading of

the statute. As discussed above, the Dioxin decision provides strong support for EPA's interpretation of Section 303(d)(1). There, this Court described a TMDL as "the cumulative total of all * * * loading attributed to NPS, natural background sources, and * * * the total load allocated to individual point sources," 57 F.3d at 1520 – a position that accords precisely with EPA's position here. Moreover, Dioxin provides the appropriate standard for assessing EPA's interpretation of the waters subject to Section 303(d) – i.e., whether EPA's reading is "clearly contrary to the intent of Congress." 57 F.3d at 1525. See id. ("Nowhere does the Act prohibit the EPA from listing waters as impaired and implementing TMDLs for toxic pollutants pursuant to § 1313(d).") Under that standard, even if Section 303(d) is deemed ambiguous, EPA's position must be upheld. Most important, this Court rejected a claim very similar to Appellants' claim here, namely, the plaintiffs' claim in Dioxin that the absence of applicable technology-based requirements precluded the listing of waters under Section 303(d)(1). See 57 F.3d at 1527-28. Appellants' effort to distinguish Dioxin on the basis that it was a "point source" case (Br. 53) misses the mark. Like the TMDL at issue in Dioxin, TMDLs for waters with NPS are not prohibited based on the inapplicability of the technology-based limitations identified in Section 303(d)(1).

Appellants do not dispute the direct relevance to this case of this Court's

statement in Alaska Center that “Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality in waters impacted by non-point source pollution ” 20 F 3d at 985 Rather, they dismiss it (Br 52) as unconsidered dictum However, this Court in Alaska Center relied on the district court’s “excellent” summary of the “statutory scheme of the CWA” in its (unappealed) merits decision in the case, see 20 F 3d at 982, in which the district court explained that TMDLs “help ensure that the cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with pollution from other NPS ” Alaska Center, 762 F Supp at 1424

By contrast, the cases on which Appellants rely provide scant support for their reading of Sections 303(d)(1) and 303(d)(2). In Oregon Natural Desert Ass’n v. Dombeck, 172 F 3d 1092, 1097 (9th Cir. 1998) (“ONDA”), this Court held that the term “discharge” in Section 401 of the Act, 33 U S C 1341, which deals with licenses or permits for discharges into navigable waters, did not include releases of pollutants from NPS See id. at 1097 ^{29/} The Court nowhere even discussed

^{29/} The Court’s statements in ONDA that Section 303 “does not itself regulate nonpoint source pollution,” that “NPS pollution is not regulated directly by the Act, but rather through federal grants for state wastewater treatment plans,” that the Act “provides no direct mechanism to control NPS pollution” and that “[w]ater quality standards are established in part to regulate point source pollution” are all consistent (continued. .)

Section 303(d) or the TMDL program. There is no conflict between the Court's construction of Section 401 in ONDA and EPA's position here. ONDA was a Section 401 case construing the term "discharge" in Section 401(a)(1). Section 401 deals with licenses or permits for the "construction and operation of facilities" that may "result in any discharge." The term "discharge" does not even appear in Sections 303(d)(1)(A), 303(d)(1)(C), or 303(d)(2), thus, the ONDA Court's holding that Section 401(a)(1) "discharges" do not include runoff from NPS does not address, let alone answer, the scope of the provisions at issue in the instant case. In addition, the general references in Section 401(a) to compliance with Section 303 are hardly surprising since Section 303 contains a number of water quality-based requirements, including the requirement to establish WQS. Section 401(a)(1) requires that any applicant for a federal license or permit that may result in a discharge provide the licensing or permitting agency with a certification from the State that the discharge will comply with Section 303, but it does not thereby limit

²⁹/ (continued)

with EPA's position here. 172 F.3d at 1096-97. The Court in ONDA did not, even arguably, hold Section 303's TMDL provisions inapplicable to NPS. As noted, TMDLs do not impose regulatory controls on NPS, but instead establish load allocations for such sources at levels necessary to implement applicable WQS – leaving to the States the choice of measures to implement or enforce those allocations.

the scope of Section 303 to point sources (a position even Appellants do not take)

ONDA is not inconsistent with EPA's position here

Nor does Appellants' position find support in Natural Resources Defense Council v. EPA, 915 F 2d 1314 (9th 1990) Appellants point to dictum in a footnote in which the Court said that Section 303(d)(1) "requires states to identify only those waters for which limitations based on the best practicable technology would not be stringent enough to implement the WQS Those waters for which limitations based on the more demanding best available technology * * * were insufficient did not have to be listed " 915 F 2d at 1322 n 9. This footnote does not help Appellants for three reasons (in addition to the fact that it does not address NPS at all, or discuss the conclusion in Alaska Center that, in fact, TMDLs are an effective means of addressing NPS pollution) First, it is dictum, and is contrary to the EPA's considered construction of Section 303(d)(1) in the 1985 regulations, which had been on the books for at least five years by the time NRDC was decided. See supra, p. __. Second, the meaning Appellants ascribe to the NRDC footnote is plainly not the law in the Ninth Circuit because it would be squarely in conflict with Dioxin, which upheld as reasonable EPA's construction of Section 303(d)(1)(A) to authorize TMDLs for pollutants for which best available technology was inadequate

to satisfy WQS. See 57 F.3d at 1527-28 ^{30/} Finally, the provision at issue in NRDC the toxic pollutant provisions of Section 304(l), actually serves to highlight one of the principal flaws in Appellants' argument here – that Congress knew how to limit the scope of its provisions to “point sources” when it so intended. See 33 U.S.C. 304(l)(1)(D) ^{31/}

D **Appellants' Arguments Based on “Administrative History” are Misguided.**

Appellants contend (Br. 39-48) that the “administrative history” of Section 303(d)(1) reflects EPA’s “belief” that “section 303(d)(1) applied only to PS-impaired waters” (Br. 39) and that EPA’s view that Sections 303(d)(1) and

^{30/} In Dioxin, this Court noted that the case before it was different from NRDC and Alaska Center in that the question was EPA’s *authority* to take the challenged actions under Section 303(d), rather than whether EPA was *obligated* so to act. 57 F.3d at 1528 (citing Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992)).

^{31/} Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (cited in Br. 51), held that plaintiffs could not bring a citizen suit under the CWA for alleged noncompliance with state WQS due to NPS pollution. This Court noted that the CWA’s citizen suit provision, 33 U.S.C. 1365(b)(1), authorizes suits based on violations of “effluent limitations” prescribed under 33 U.S.C. 1311 or 1312, which are defined (33 U.S.C. 1362(11)) as limited to discharges by point sources. See 834 F.2d at 849. ONRC says nothing about the scope of Section 303(d), and provides no support for Appellants’ view that the Section 303(d)(1) listing requirement turns on the source of pollution in substandard waters.

303(d)(2) apply to all substandard waters was not arrived at until 1992 ^{32/}

Appellants, however, simply ignore the plain language of EPA's early TMDL regulations. Moreover, they distort various agency pronouncements and attempt to transmute the administrative delays in implementing the entire TDML program, and EPA's decision to devote most agency water pollution control resources initially to implementing the 1972 Act's technology-based effluent limitation provisions, into an affirmative agency policy that TMDLs did not apply to "NPS-only" impaired waters ^{33/}

Appellants never actually produce any agency pronouncement -- let alone authoritative legal position -- taking the narrow reading of Section 303(d) they ascribe to EPA before 1992 ^{34/} As explained above (pp. 16-20), the regulatory

^{32/} Appellants suggest (Br. 43) that EPA disapproved California's 1992 list because it did not contain "NPS-only" waters, as required by EPA's allegedly 'new' policy. To the contrary, California had long been listing waters impaired only by NPS. See FSER 133-34, 153, 156, 160, 163, 167-81.

^{33/} Appellants' argument, even if accurate, would not undermine EPA's position here, because even they admit (Br. 43) that EPA's position since at least 1992 has been that Section 303(d)(1) "'applies equally to segments affected by point sources only, a combination of point and NPS, and NPS only '" Br. 43 (quoting ER Tab 91 at 2)

^{34/} Appellants go to great lengths in their effort to characterize EPA's administrative history as inconsistent. For example, they state (Br. 47) that "EPA's reading of section 303(d)(1) has been controversial even within federal administrative circles,"

(continued)

history demonstrates that EPA has long regarded NPS pollution as covered by Sections 303(d)(1) and (2). The currently effective regulations, dating back to 1985, apply to all substandard waters, regardless of the source of the pollution. Further, in guidance issued *before* the alleged “change [of] position” in 1992 (Br. 43), EPA stated its view that the TMDL program applies to all substandard waters for which technological and other required controls fail to bring waters up to WQS. See FSR 196 (1983 guidance), FSR 82, 90-91 (1991 guidance).

Appellants’ use of the 1997 guidance from EPA Assistant Administrator Robert Perciasepe to try to undermine EPA’s position is misleading and unpersuasive. See Br. 44 (citing ER Tab 91 Att. 7). Appellants try to wring far too much out of this document—a comment that agency *guidance* dealing with “implementation” was “incomplete,” ER Tab 91 Att. 7 at 5, is a far cry from a statement that the agency had until that moment believed that it (and the States) lacked authority to establish TMDLs for NPS-only substandard waters ^{35/}

^{34/} (. . .continued)

citing the Federal Advisory Committee Report concerning TMDLs. Characterizing the FACA committee as a product of “federal administrative circles” is simply wrong; that committee was comprised of individuals with diverse backgrounds, including farming and timber, and did not include *any* Federal agency representatives as voting members.

^{35/} Appellants lop off a portion of the quoted sentence that tends to defeat their

(continued)

Historically, EPA gave priority to establishing TMDLs primarily affecting point sources because, among other reasons, the federal government possessed direct enforcement authority to implement TMDLs for such sources through NPDES permits. See FSER 85, 91. But agencies may properly choose to direct their scarce resources to one aspect of a problem, without thereby forfeiting their authority to address another aspect. See National Ass'n of Broadcasters v. Federal Communications Comm'n, 740 F.2d 1190, 1207 (D.C. Cir. 1984). Cf. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (emphasizing agencies' appropriate role in weighing the "many variables involved in the proper ordering of its priorities")

Appellants acknowledge that the 1985 regulations "did take NPS pollution into account," but assert that this approach did not extend to "NPS-only waters" because "TMDLs were defined as the *sum* of Wasteload Allocations and Load Allocations for NPS." Br. 42 (citing 40 C.F.R. 130.2(i), *emphasis in original*). However, Appellants fail to deal with the fact that the regulations require that States

³⁵/ (continued)

position. The Assistant Administrator said that EPA's guidance was incomplete "because it does not yet address implementation of TMDLs for waters impaired only by NPS or by a blend of point and nonpoint sources in which nonpoint sources predominate." ER Tab 7 at 5 (language omitted by Appellants emphasized). Even Appellants concede that TMDLs must be prepared on "blended" waters. Br. 56 n.10

list and establish TMDLs for all substandard waters, including those where other required pollution control measures, including "best management practices," are "not stringent enough to implement any WQS applicable to such waters " 40 C.F.R. 130.7(b)(iii). The regulations do not exclude any class of substandard waters from their scope, based on the source of the pollution. EPA's expression of the definition of a TMDL as the "sum" of point-source load allocations and nonpoint-source load allocations, 40 C.F.R. 130.2(i), does *not* exclude "NPS-only" waters from the scope of Section 303(d)(1) listing and TMDL requirements any more than it excludes "point source-only" waters. A mathematical "sum" can be the combination of two positive numbers (point source plus NPS) or a positive number and zero (a NPS but no point source). Ten is the sum of zero plus ten, just as it is of five plus five.

Moreover, Appellants' position is belied by the fact that, during the 1980s, States listed and developed TMDLs for waters impaired solely by NPS, as is evident from the history within EPA's Region 9. California's Section 303(d) lists for 1978-79, 1980-81, 1982-83, and 1983-84 all included rivers impaired only by NPS. FSER 153, 156, 160, 163 ^{36/} On California's 1988 list, the *majority* of listed

^{36/} And as the district court noted (91 F.Supp.2d at 1354), in 1979 Nevada adopted
(continued.)

waters were impaired solely by NPS FSER 167-81

A commentator on whom Appellants repeatedly rely (Br 40, 43, 44, 48), has observed that EPA's construction of Sections 303(d)(1) and 303(d)(2) to apply to NPS-impaired waters "is bolstered by the fact that EPA has given the statute the same reading, consistently, from the issuance of its first regulations," constituting "20 years of consistent agency interpretation " Houck, 27 Env'tl L Rep at 10400. This consistent administrative history should be "dispositive" of challenges to EPA's construction Id.^{37/}

E **EPA Does Not Claim Authority to Supplant Local Land Use Planning, and its Reading of the Statute Does Not Offend Federalism Principles.**

Contrary to the claims of Appellants and their *amici*, EPA readily agrees that the Agency cannot *regulate* NPS pursuant to Section 303(d) by *requiring* load reductions from NPS See Pronsolino, 91 F.Supp.2d at 1355-56. If any load reductions on a NPS are required by a regulatory control, such as a permit, it is

^{36/} (continued)

TMDLs for the Walker River, which had no point source discharges The record contains examples of TMDLs with NPS allocations Atts 24-26 to Doc 91.

^{37/} For the same reasons, Appellants' effort to invoke FDA v. Brown & Williamson Tobacco Corp., 120 S Ct 1291 (2000), and BankAmerica Corp. v. United States, 462 U.S. 122 (1983), is entirely misplaced. See Pronsolino, 91 F Supp 2d at 1354-55 n 17

because a State has chosen to make the load allocation identified in a TMDL mandatory^{38/} Section 303(d) does not create any new implementation authority for EPA or the States. Appellants mistakenly equate the water quality-based approach solely with a regulatory control function. The role of WQS, however, extends beyond regulation of point sources, as the district court carefully explained. 91 F Supp 2d at 1346-47. Section 303(d) merely affords EPA and the States the authority to identify all impairments of those standards (point source and NPS) and to devise comprehensive WQS attainment plans (i.e., TMDLs). See 91 F Supp 2d at 1346-47, 1355. It does not constitute, or require, “regulation” of NPS.^{39/}

Nor is there any merit to the suggestions of Appellants and amici that EPA’s construction of the Act impinges upon States’ sovereignty, particularly in light of States’ substantial discretion in implementing TMDLs covering NPS. See

^{38/} Indeed, EPA’s TMDL for the Garcia River contains no site specific prescriptions. Instead, it merely identifies broad categories of controllable sediment sources (e.g., mass wasting from roads in general) and establishes for each source a sediment allocation and target reduction. See ERTab 91, Att. 1 at 36.

^{39/} EPA’s efforts to encourage implementation of TMDLs by conditioning grants is fully consistent with the CWA and does not constitute “threats” (Br. 60 n.12) or “coerc[ion]” (WESTCAS Br. 14). See Shanty Town Assocs. Ltd. v. EPA, 843 F.2d 782, 791-792 (4th Cir. 1988), Illinois v. EPA, 947 F.2d 283, 286-91 (7th Cir. 1991). The constitutionality of federal fiscal incentives to States is well-established, New York v. United States, 505 U.S. 144, 167 (1992), and the case presents no Tenth Amendment issue.

Pronsolino, 91 F Supp 2d at 1355 The TMDL program reflects the “partnership between the States and the Federal Government” that underlies the CWA as a whole See Arkansas, 503 U S at 101 Indeed, any contention that the EPA’s position infringes upon State prerogatives is substantially undercut by the State of California’s support for EPA’s position in this case As the State noted below, the CWA’s TMDL program “provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power By empowering States, this process actually enhances state and local control ” Cal Amicus Br 9-10 (filed Feb 22, 2000) (Doc 100)

CONCLUSION

The judgment of the district court should be affirmed

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is printed in proportionately spaced 14-point type, and that it contains 15,381 words, which is within the limits established in the Court's order of October 13, 2000

A handwritten signature in black ink, appearing to read "A. H. Donahue", is written over a horizontal line.

Sean H Donahue

CERTIFICATE OF SERVICE

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