Nos. 00-16026 and 00-16027

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDO A. PRONSOLINO *et al* ,	)	
	)	
Plaintiffs - Appellants,	)	
	)	Appeal from the United
AMERICAN FOREST AND PAPER ASS'N *et al* .	)	States District Court for
	)	the Northern District of
Intervenors-Appellants,	)	California
	)	
v.	)	
	)	
FELICIA MARCUS, Regional Administrator, United States Environmental Protection Agency *et al* .	)	CV-99-01828-WHA
	)	
Defendants - Appellees.	)	
	)	Judge Alsup
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC. *et al.*,	)	
	)	
Intervenors-Appellees.	)	

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ARGUMENT

The issue before this Court is whether Congress intended to subject NPS-only impaired waters to section 303(d)(1) TMDLs. EPA and its intervenor and amicus supporters attempt to evade that issue by rhetorically pronouncing clean water good, NPS pollution bad, and TMDLs effective. We too are champions of clean water – as farmers and landowners we depend on it. And we agree that NPS pollution must be addressed. But EPA's rejection (at 44) of a "strict interpretation" of section 303(d)(1) is not lawful. Congress chose specific means, in sections 208 and 319 of the Act, to address NPS pollution, with section 303(d)(1) TMDLs expressly directed to PS pollution. That statutory schema should be respected. EPA obviously wishes that Congress had written the Act differently, but only Congress – not EPA or the courts – has the authority to amend it. Moreover, as the Supreme Court ruled just this week, an agency's interpretation of the Clean Water Act that permits "federal encroachment" upon "the States' traditional and primary power over land and water use" cannot stand. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 2001 WL 15333, at *8 (Jan. 9, 2001) ("*SWANCC*").

A. EPA's Position Rests On Its Deletion Of Critical Terms From Section 303(d)(1).

EPA's construction of section 303(d)(1)(A) requires that it be changed as follows:

> "Each State shall identify those waters within its boundaries ~~for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement~~ [not meeting] any water quality standard applicable to such waters."

Without deleting the lined-out text, EPA cannot sustain its position that section 303(d)(1)(A) requires the identification of *all* substandard waters for the establishment of TMDLs. See EPA Br. 11, 36. But the provision that Congress actually enacted contains all the words lined out above. EPA's construction, which fails to give effect to those words, cannot stand. See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).

The principle that all words in a statute must be given effect holds with special force here. The words deleted by EPA plainly are not extraneous or drafting errors. They carefully carve out the specific type of waters that Congress intended be identified and subject to mandatory TMDLs. They state unambiguously that only waters subject to the specifically defined effluent limitations – which can only be PS-impaired waters, as we demonstrated in our opening brief (at 17) and as EPA does not contest – are to be identified. The words that EPA would delete thus restrict the

waters to be identified to a limited class, and such limiting words must be given effect if the intent of Congress is not to be defeated. As this Court has explained, where statutory language "cuts back or qualifies other language that sweeps very broadly, there's a particularly strong inference that the legislature employed the qualifier to limit the more general language in some meaningful way." *Hearn v. Western Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995); see also *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998) (courts must give "words of limitation meaning").

EPA responds (at 31-32) that section 303(d)(1)(A) does not expressly *prohibit* the listing of NPS-only impaired waters for TMDL purposes. EPA has it backwards – EPA has no powers other than what the statute provides, and EPA thus exceeds its authority unless the statute *authorizes* EPA to list such waters. Moreover, section 303(d)(1)(A) *does* prohibit the listing of NPS-only impaired waters. EPA can take its position to the contrary only by ignoring the statutory language it would like deleted. Waters not impaired by PS pollution, like the Garcia River, are not in the class of waters defined in section 303(d)(1)(A) because they are not subject to effluent limitations at all, no matter how stringent. EPA simply has no explanation for the statute's "not stringent enough" language.

EPA's related argument – that if Congress intended to restrict section 303(d)(1) waters to point sources "it could have said precisely that" (EPA Br. 41) – ignores the fact that Congress did say precisely that by limiting the listed waters to those subject to effluent limitations. It would not have made sense for Congress to use the words "all PS-impaired waters" because it did not intend that all PS-impaired waters be listed. Instead, it mandated the listing only of waters subject to "the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B)," *i.e.*, waters subject to best practicable technology ("BPT") controls. See Pl. Opening Br. 22. The text and meaning of section 303(d)(1)(A) are completely congruent, unlike under EPA's interpretation.

EPA attempts to divert attention from its deletion of the "effluent limitations * * * not stringent enough" limitation by focusing (at 35) solely on the immediately succeeding words – "to implement any water quality standard applicable to such waters." But even if that tunnel vision approach were permissible, it would not salvage EPA's position. The words "such waters" plainly refer back to the immediately preceding antecedent – waters "for which the effluent limitations * * * are not stringent enough." See *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 832 (9th Cir. 1996) (modifying phrase applies "to the phrase immediately preceding it"). And if Congress had intended to require listing of all waters that do

not "satisfy" or "meet" or "attain" or "maintain" water quality standards, as EPA's position requires, it would not have used the word "implement." "Implement" means "to give practical effect to and ensure of actual fulfillment by concrete measures." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1134 (1971); see *United States v. Hammer*, 2000 WL 1610380, at *2 (M.D. Pa. Oct. 24, 2000) (applying dictionary definition of "implement"). The use of "implement" in section 303(d)(1)(A) plainly links the specified effluent limitations ("concrete measures") to the water quality standards. Thus, no matter which part of the sentence one highlights, only PS-impaired waters – those subject to effluent limitations that would not be stringent enough to implement water quality standards – are to be listed for section 303(d)(1) TMDLs.[1/]

EPA (at 37, 41-42) and Intervenor-Appellee AMSA (at 6) nevertheless argue that, despite the plain text, Congress must have intended to mandate TMDLs for NPS-only waters like the Garcia River because otherwise it would not be possible to "implement any water quality standard" for them. But even if it were proper to disregard the considered words of the statute, that argument fails. The CWA and state

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[1/] Congress did not use the term "implement" when it intended to address NPS pollution, as in Section 319, where it instead used the terms "attain" and "maintain." See 33 U.S.C. § 1329(a)(1) (requiring identification of waters "which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to *attain* or *maintain* applicable water quality standards") (emphasis added).

law offer numerous means – other than mandatory TMDLs – to achieve water quality standards for waters not subject to PS pollution. See §§ 208, 319, 33 U.S.C. §§ 1288, 1329; Cal. Water Code §§ 13000 *et seq.* Thus, excluding NPS-only impaired waters from section 303(d)(1)(A) lists would not render the water quality standards approach "inapplicable to a large proportion of waters that are not meeting WQS." EPA Br. 42. Respecting the statutory mandate merely would require such standards to be attained by using other and more appropriate tools, as Congress intended.

EPA tries to explain the presence of the "effluent limitations" language in section 303(d)(1)(A) by calling it "a first line of defense against substandard water quality." EPA Br. 33. That may be so, but it does not explain why Congress limited the waters to be identified to those for which effluent limitations are not stringent enough. EPA's failure to provide any plausible explanation for this congressionally imposed restriction on the waters subject to mandatory TMDLs dooms its case.

EPA also cannot explain away the fact that section 303(d)(1)(A) requires listing of only those waters for which *specific* and relatively undemanding effluent limitations would be insufficient to implement water quality standards, namely, those based on BPT. As we demonstrated in our opening brief (at 22), this specification shows that Congress intended mandatory TMDLs to aid in the implementation of

more stringent effluent controls, such as those based on best available technology ("BAT") – not to force land-use controls over NPS pollution on states and localities.

EPA responds (at 43-44) that such a "strict interpretation" of the plain language in section 303(d)(1)(A) would be "implausible" and "bizarre," on the ground that the 1972 Act required BPT controls to be replaced by BAT controls by 1983 (later changed to 1989). But there is nothing implausible or bizarre about Congress' expectation that TMDLs would play a useful role in guiding the fight against PS pollution for over a decade after enactment. The goal of the 1972 Act was to eliminate "the discharge of pollutants into the navigable waters * * * by 1985." 1972 Act § 101(a)(1), 33 U.S.C. § 1251(a)(1). That goal may seem impractical in hindsight, but it explains why Congress linked TMDLs to BPT controls over PS pollution. Congress cannot have expected that EPA would wait until 1985 – the very year targeted for reaching the statutory goal – to finalize TMDL regulations, or that EPA would refuse to implement the section 303(d) TMDL provisions until courts ordered it to act. See EPA Br. 18, 21. Thus, EPA's objection to a "strict" – *i.e.*, plain text – reading of section 303(d)(1)(A) is baseless.

EPA also finds it "odd" (at 48) that pollution emanating from a single point source would make an otherwise NPS-only impaired water subject to TMDL listing. But that is what Congress mandated so long as BPT technological controls over that

point source are insufficient to allow the achievement of water quality standards. There is nothing "odd" about Congress' approach, especially in light of its inclusion of section 208 in the 1972 Act to address NPS pollution. It is EPA's approach – disregarding the express limiting language in the statute, requiring that all impaired waters be listed for TMDL purposes, and refusing to make full use of the anti-NPS tools that Congress did provide – that is truly "odd," as well as being unlawful, arbitrary, and capricious.

EPA's own description of the 1972 Act refutes its position on the scope of TMDLs. EPA admits (at 6) that the 1972 Act constituted a "complete rewriting" of existing federal water pollution legislation, introducing a "radically different" approach based on "technology-based effluent limitations." And EPA correctly observes (at 7) that the 1972 Act also "preserved" and "retain[ed]" the prior approach, based on enforcement of state water quality standards. It is not surprising, then, that *new* anti-pollution tools introduced in the 1972 Act were directed to PS pollution. Those novel elements included TMDLs, which unquestionably made their statutory debut in the 1972 Act as one of the "radically different" tools devised by Congress to address PS pollution. That conclusion is reinforced by the fact that Congress nowhere indicated – anywhere in the text or legislative history of the CWA – that it intended section 303(d)(1) TMDLs to address NPS pollution.

B. EPA's Position Cannot Be Reconciled With The Structure of the CWA.

Unable to explain away Congress' express limitation of the waters to be listed under section 303(d)(1) to waters subject to effluent limitations, EPA tries to make its case with two structural arguments. But those arguments are wrong on their face, and the structure of the Act actually undermines EPA's position.

EPA first contends (at 33) that section 303(d)(1) must be addressed to NPS-only impaired waters because Congress placed it in section 303, which concerns water quality standards. But, as the Supreme Court has emphasized, the 1972 Act retained water quality standards "so that numerous *point sources*, despite individual compliance with effluent limitations, may be *further regulated* to prevent water quality from falling below acceptable levels." *EPA v. California*, 426 U.S. 200, 205 n.12 (1976) (emphasis added). Thus, it was perfectly logical (and consistent with the limited function of section 303(d)(1)(A)) to place the new TMDL provisions, directed to PS-impaired waters requiring further PS regulation, in a section dealing with water quality standards.

EPA next claims to find support for its interpretation of section 303(d)(1)(A) from the requirements of subsections (d)(1)(C) and (d)(2) that TMDLs be *established* at levels "necessary to implement the applicable water quality standards." EPA Br. 35. But subsection (d)(1)(C) does so only "for the waters identified in paragraph

(1)(A)" which, as we have demonstrated, are PS-impaired waters subject to effluent limitations. And subsection (d)(2) also states that it applies only to "such waters." Thus, neither provision can justify disregarding the limiting words in subsection (d)(1)(A) which restrict mandatory TMDLs to PS-impaired waters.

In fact, the structure of the CWA refutes EPA's position. For example, section 303(d)(3), which addresses informational and estimated TMDLs for waters "not identified under paragraph (1)(A)," is more suitable for NPS-only impaired waters than section 303(d)(1). See Pl. Opening Br. 26-27. EPA argues (at 11) that Congress intended the subsection (d)(3) list to contain all waters meeting water quality standards, serving as the counterpart to the subsection (d)(1) list containing (according to EPA) all substandard waters. But if Congress intended to draw such a straightforward line between compliant and substandard waters, it presumably would have said so in less convoluted fashion. See *Great W. Broadcasting Corp. v. NLRB*, 310 F.2d 591, 600 (9th Cir. 1962) (Congress would not have rejected "easy way" of expanding statutory provision's coverage and instead adopted "detailed limiting provisions" if it had "intended that the proviso was to have the broad coverage given to it by the agency"); *In re Silveira*, 141 F.3d 34, 36 (1st Cir. 1998) (Congress would have used "simpler construction" if it intended "all-or-nothing" meaning).

A more plausible explanation for the apparently imprecise definition of subsection (d)(3) waters is that the waters "identified under paragraph (1)(A)" are not subject to a convenient short-hand description. As we have seen, the waters "identified under paragraph (1)(A)" are those for which BPT effluent limitations are not stringent enough. This precise, if somewhat complex, definition of (d)(1)(A) waters explains why Congress defined the subsection (d)(3) waters as those "not identified under paragraph (1)(A)." The line drawn by EPA between subsections (d)(1) and (d)(3), on the other hand, cannot be reconciled with the text or structure of section 303(d).

The limited scope of section 303(d)(1) is also supported by section 208, "a separate portion of the Act" addressed to NPS pollution. *Oregon Natural Resources Council v. USFS*, 834 F.2d 842, 849 (9th Cir. 1987); see Pl. Opening Br. 27-29. EPA argues (at 51) that section 208 was merely "an additional mechanism" for addressing NPS pollution that sheds no light on the scope of section 303(d)(1). But contemporaneous commentaries unanimously described section 208 as *the* contribution of the 1972 Act to cleaning up NPS pollution. See Pl. Opening Br. 28-29. Nothing in those commentaries – or in the text or legislative history of section 208 – indicates that section 208 was to be a mere add-on to the fight against NPS pollution, nor that section 303(d)(1) was to play any role at all in that fight. Above

all, section 208 shows that Congress knew how to make clear when it was addressing NPS pollution in a statute directed primarily to PS pollution. EPA cannot explain why Congress did not do the same in section 303(d)(1) if it intended that provision to apply to NPS pollution.

EPA also cannot explain why, if section 303(d)(1) TMDLs already addressed NPS pollution, Congress would have enacted section 319 in 1987. Section 319 requires, *inter alia*, the identification of state waters "which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards." 33 U.S.C. § 1329(a)(1). That section 319 language patently tracks the text of section 303(d)(1), with the changes reflecting the later amendment's focus on NPS pollution as opposed to the earlier provision's focus on PS pollution. See Pl. Opening Br. 30-31.

EPA responds (at 53) that the two provisions provide "complementary analytic tools" to fight NPS pollution, and that Congress added section 319 to authorize the states to implement their own NPS management programs. But section 303 already authorized the states to incorporate TMDLs into their own management programs. See § 303(d)(2), (e)(3)(C). If section 303(d)(1) already addressed NPS pollution through TMDLs, as EPA asserts, there would have been no need to add the parallel provisions in section 319. See J. Davidson, *Thinking About Nonpoint Sources of*

Water Pollution and South Dakota Agriculture, 34 S.D. L. Rev. 20, 21 (1988/1989) (section 319 represented congressional attempt to launch focused "process of nonpoint source control").

EPA also argues (at 52) that because section 319 was enacted in 1987, it says nothing about the meaning of section 303(d)(1) in the 1972 Act. Our opening brief (at 31 n.5) cited Supreme Court authority to the contrary and explained why section 319 cannot be ignored in determining whether EPA has exceeded its authority under the CWA. At a minimum, the enactment of section 319 shows that the 1987 Congress did not share EPA's current view that section 303(d)(1) TMDLs were an available tool for fighting NPS pollution, a conclusion confirmed by the lack of any mention of TMDLs in the legislative history of section 319. There is certainly no reason to accord less weight to the views of the 1987 Congress than to the post-1992 views of EPA.[2/]

[2/] EPA's position on the significance of post-1972 amendments is inconsistent. It offers an argument (at 41 n.20) based on § 304(*l*)(1)(B), which, like § 319, was added to the CWA in 1987. See Pub. L. 100-4 § 308(a). Section 304(*l*)(1)(B) is irrelevant to the issue here – not because it was added in 1987 – but because it addresses only toxic pollutant discharges from point sources.

C. EPA's Position Cannot Be Reconciled With The 1972 Act's Legislative History.

EPA offers no response at all to the wealth of legislative history cited in our opening brief (at 32-35); see also Brief Amicus Curiae of Pacific Legal Foundation *et al.* 12-21 (citing additional legislative history). That history demonstrates that Congress intended mandatory TMDLs to address PS pollution and never expressed or even hinted that it intended them to address NPS-only impaired waters.

Nor does EPA offer any legislative history that supports its own position. Instead, it simply adopts the wishful contention of Oliver Houck that the House Report's recognition of the importance of NPS pollution "implies" that Congress intended TMDLs to address NPS-only impaired waters. See EPA Br. 37-38. In fact, as courts have observed, the most that can be coaxed out of the legislative history is that the 1972 Congress "would have regulated so-called nonpoint sources if a workable method could have been derived." *United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979); accord *Shanty Town Assocs. L.P. v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988). And even Houck has been forced to admit that it is "unclear * * * whether the committee envisaged that the TMDLs include nonpoint sources." O. Houck, THE CLEAN WATER ACT TMDL PROGRAM 41 n.93 (1999). The fact that EPA can come up with only an *unclear implication* that Congress intended mandatory TMDLs to apply to NPS pollution validates our position that Congress intended no

such thing, especially given the fierce debate that typically accompanies any attempt to address NPS pollution through federal action.

D. EPA's Position Cannot Be Reconciled With This Court's Precedents.

Our opening brief (at 49-52) explained that this Court has rejected attempts, similar to that of EPA here, to transform CWA provisions directed to PS pollution into tools to control NPS pollution. See *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) (§ 401 permit process applies only to PS discharges, in part because § 401 does not refer to NPS pollution; § 303 retains water quality standards "to regulate point source pollution"); *Oregon Natural Resources Council*, 834 F.2d at 849 & n.12 (§ 301 effluent limitations do not apply to NPS pollution, which is addressed by §§ 208 and 319).

EPA's response (at 56-57 & 59 n.31) – that *Dombeck* and *USFS* did not directly address TMDLs – misses the point. Those cases recognize that the 1972 Act was primarily directed to PS pollution, so that when Congress intended to have a particular provision apply to NPS pollution, it expressly said so. The same reasoning produces the same result here. In light of the statutory scheme, the fact that section 303(d)(1) does not mention NPS pollution or contain any indication that mandatory TMDLs apply to NPS-only impaired waters confirms that it is directed to PS-impaired waters only.

EPA also dismisses this Court's express statement – that § 303(d) "requires states to identify *only* those waters for which limitations based on the best practicable technology would not be stringent enough to implement the water quality standards" (*NRDC v. EPA*, 915 F.2d 1314, 1322 n.9 (9th Cir. 1990) (emphasis added)) – as "dictum" that "is contrary to the EPA's considered construction." EPA Br. 58. Of course, it is just that EPA construction that is at issue here, and the fact that EPA has to turn to itself as an authority to refute this Court highlights the weakness of its position.

EPA's only judicial citations in support of its position provide it with no support at all. It relies primarily on *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir. 1995), in which this Court upheld the issuance of TMDLs for waters polluted by PS toxic pollutants where effluent limitations had not been deployed. EPA argues (at 55) that, based on *Dioxin*, it may issue TMDLs for waters, like the Garcia River, that are not subject to effluent limitations at all. But the controversy in *Dioxin* concerned only whether TMDLs for PS *toxic* pollutants had to await the "proven failure" of BPT effluent limitations. 57 F.3d at 1526. It did not involve the issue in this case – whether TMDLs may be mandated for waters for which effluent limitations are wholly inapplicable and thus for which there *can* be no "proven" success or failure. Moreover, this Court made clear that its decision in *Dioxin* rested

on the immediate dangers posed by toxic pollutants, considerations inapplicable to "conventional pollutants," like those at issue here, for which "there is not the same pressing necessity to impose the burdens created by TMDLs." *Id.* at 1528.

EPA also relies (at 35) on *Alaska Center for the Environment v. Browner*, particularly the Court's comment that "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution." 20 F.3d 981, 985 (9th Cir. 1994). We addressed that comment in our opening brief (at 52), and re-emphasize here that the Court's statement is fully consistent with our position that section 303(d)(1) is inapplicable to waters impaired *solely* by NPS pollution, an issue that was not even briefed in *Alaska Center*. The same is true of the *Alaska Center* district court's view (quoted in EPA Br. 56) that TMDLs ensure that the impacts of "multiple point source discharges" are evaluated "in conjunction with pollution from other NPS." As we have noted, this case does not raise issues involving TMDLs for so-called blended waters, *i.e.*, those affected both by PS and NPS pollution.[3/]

[3/] As we explained in our opening brief (at 56 n.10), this appeal does not raise the applicability of § 303(d)(1)(A) to blended waters, an issue more appropriately addressed in the context of a case involving such waters. Nevertheless, we agree with EPA (at 47) that the Court should "not ignore the logical implications" of its ruling for any such future case. Contrary to EPA, however, a ruling that § 303(d)(1)(A) precludes the listing of NPS-only impaired waters would not create "a chasm" in the CWA's statutory scheme or tie the Court's hands in a future case involving blended waters. Such a ruling would be fully consistent with that provision's required

E. EPA's Revisionist Administrative History Is Inaccurate And Cannot Salvage Its Position.

EPA devotes much of its brief to insisting that its current view on the applicability of mandatory TMDLs to NPS-only impaired waters is longstanding and consistent. Even if its history were accurate (it is not, as demonstrated below), EPA misses the point. Regulatory action that conflicts with the intent of Congress is unlawful, no matter how lengthy its pedigree. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language"). In any event, as our opening brief demonstrated (at 40-47), the "history" EPA now recites is fiction. EPA never endorsed the applicability of section 303(d)(1) TMDLs to NPS-only impaired waters prior to the 1990s, and EPA's response fails to cite a single instance where it did. See *SWANCC*, 2001 WL 15333, at *5 (agency's "*original* interpretation of the CWA * * * is inconsistent with that which it espouses here") (emphasis in original).

Instead, EPA cites earlier statements that have nothing to do with the waters to which section 303(d)(1) TMDLs are applicable. See EPA Br. 16-18. Those statements appear in notices that do not address section 303(d) but rather the contents

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identification of all PS-polluted waters, included blended waters, for which BPT controls are not stringent enough to achieve water quality standards. How to establish and utilize TMDLs for such waters can and should await the appropriate case.

of water quality management plans under sections 208 and 303(e). See 40 Fed. Reg. 55334, 55337, 55344 (1975), 40 C.F.R. §§ 130.1, 131.1 (1976); 44 Fed. Reg. 30016, 30026 (1979), 40 C.F.R. § 35.1500(1979). That such water quality management plans must take all types of pollution into account is not in dispute and has no bearing on whether the Act mandates section 303(d)(1) listing and TMDLs for NPS-only impaired waters, an issue on which none of the cited materials comment.

EPA also misleadingly cites its 1978 statement that "[a]ll pollutants" are suitable for the calculation of TMDLs under proper conditions. EPA Br. 17. That statement concerned merely the applicability of TMDLs to particular *types* of pollutants, not to their *source*. It appeared in a Notice stating its purpose as "to finalize EPA's identification of pollutants suitable for total maximum daily load calculations," as required by section 304(a)(2) of the 1972 Act. 43 Fed. Reg. 60662, 60662 (1978). The Notice stressed that "the proposed identification of pollutants is not intended to require States to devote additional resources to TMDL and wasteload allocation development." *Ibid.* It too contained no statement concerning whether NPS-only impaired waters were subject to mandatory loads.

EPA also asserts (at 18) that its TMDL regulations, first issued in 1985, support its position. But those regulations nowhere refer to NPS-only impaired waters, much less adopt a position as to whether they are subject to mandatory TMDLs. To the

contrary, EPA prefaced those regulations with the statement that states had to establish TMDLs "only where such TMDLs are needed to 'bridge the gap' between existing effluent limitations, other pollution controls and WQS." 50 Fed. Reg. 1774, 1775 (1985). NPS-only impaired waters plainly do not fit that description. As EPA recognized at that time, "those waters not covered by this interpretation" are subject only to the informational and estimated TMDLs under section 303(d)(3). *Ibid.*

EPA cannot escape its own admission, in the 1997 Perciasepe memorandum, that EPA had "not yet address[ed] implementation of TMDLs for water impaired only by nonpoint sources or by a blend of point and nonpoint sources in which nonpoint sources dominate." See Pl. Opening Br. 44; ER-91 Ex. 7, at 5. EPA objects (at 61) that we "try to wring far too much out of this document," but even Oliver Houck, the fervent academic adherent of mandatory TMDLs, has noted that "the first time" EPA applied section 303(d)(1) directly "to exclusively nonpoint waters" was in the Perciasepe memorandum. Houck, *supra*, at 80.

Of course, the critical point is that EPA's current position is inconsistent with the statutory text. Our demonstration that its position is of recent vintage simply helps underscore that, for some two decades after the 1972 Act, *no one* – Congress, courts, commentators, or EPA itself – took the position that section 303(d)(1) TMDLs apply to NPS-only impaired waters. There is no reason to revise that universal

understanding now simply because, as EPA puts it (at 62), its "priority" has changed. See *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956) (agency's "more recent ad hoc contention as to how the statute should be construed cannot stand" against its "prior longstanding and consistent administrative interpretation"); *Kenai Peninsula Borough v. Alaska*, 612 F.2d 1210, 1214 (9th Cir. 1980) (refusing to regard longstanding agency view as "inadvertent statutory construction"), aff'd sub nom. *Watt v. Alaska*, 451 U.S. 259 (1981). EPA is free to try to persuade Congress to adopt EPA's priorities, but it may not unilaterally amend the Act itself.[4/]

F. Congress Did Not Intend To Have The Federal Government Oversee Local Land Use Planning.

As the Supreme Court recently held, courts must reject an agency's statutory interpretation that "alters the federal-state framework by permitting federal encroachment upon a traditional state power" without a "clear indication that Congress intended that result." *SWANCC*, 2001 WL 15333, at *8. That principle holds especially where the agency's interpretation would result, as here, "in a

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[4/] EPA's suggestion (at 63-64) that California's inclusion of NPS-only impaired waters prior to 1992 supports its position fails for two reasons. *First*, whether the waters to which EPA refers were actually NPS-only impaired waters is a question of fact that was disputed below and not resolved by the district court. The parties stipulated below that "EPA's analysis" deemed those waters NPS-only impaired and that "Plaintiffs do not believe they have adequate information to determine whether this analysis is correct." *Second*, whether California listed NPS-only impaired waters says nothing about whether the CWA *requires* their listing or whether EPA itself could list them if (as occurred with the rivers at issue here) California did not.

significant impingement of the States' traditional and primary power over land and water use." *Ibid.*

EPA denies (at 64-65) that it claims authority over local land use planning, contending that its mandatory TMDLs are purely informational aids with no regulatory impact. But its brief ignores the factual record below and conveniently omits any reference to EPA's threat of "nasty little tricks" unless California implemented EPA's Garcia River TMDL. See Pl. Opening Br. 9, 59. EPA cannot deny that, after California refused to include the Garcia River and other NPS-only impaired waters on its section 303(d)(1) list, EPA *required* them to be listed, *wrote* the 1992 Garcia River TMDL with its mandatory language and specific sediment loadings, and *required* California to implement the EPA TMDL through additional restrictions on timber harvesting. See *id.* at 58. Thus, EPA's litigation position is belied by the factual record.

EPA's contention (at 65) that this is not really regulation because the states determine *how* to implement mandatory TMDLs rings hollow in light of its strong-arm behavior, as reflected in the record. At a minimum, EPA plays the role of TMDL super-regulator, overseeing the states' land use controls. But the Constitution does not permit the federal government to "regulate state governments' regulation" of local

land uses, as EPA seeks to do. *New York v. United States*, 505 U.S. 144, 166 (1992); see Pl. Opening Br. 56-59; Intervenor-Appellants' Opening Br. 3-7.

Significantly, organizations representing the states have vehemently opposed EPA's efforts to expand TMDLs to reach NPS-only impaired waters. When EPA proposed its new TMDL regulations incorporating that position (see EPA Br. 9 n.5), objections were voiced by the Environmental Council of the States (of which 52 states and territories are members), the Association of State and Interstate Water Pollution Control Administrators, and the Coastal States Organization. In comments submitted to EPA, these organizations denied "that USEPA has clear statutory authority for proposed nonpoint source requirements," explaining that "the requirement to include waterbodies solely impacted by nonpoint sources on the 303(d) list is a strained interpretation of Section 303(d)(1)(A)."[5/]

G. EPA's Rejection Of The Statutory Text Merits No Deference.

EPA contends (at 29-30, 39-40) that its construction of section 303(d)(1) is entitled to *Chevron* deference. But an agency's interpretation of a statute is entitled to no deference unless the statute is ambiguous on the point at issue. *Dunn v. CFTC*, 519 U.S. 465, 479 n.14 (1997); *Defenders of Wildlife*, 191 F.3d at 1164; *Pacific Rivers Council v. Thomas.*, 30 F.3d 1050, 1054 (9th Cir. 1994). As we have demonstrated,

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5/ See Comments and Recommendations 10, 15 (Jan. 20, 2000), http://www.sso.org/ecos/projects/cleanwater/tmdlcomments.htm.

Congress unambiguously made clear that section 303(d)(1) is to apply only to PS-impaired waters by specifically requiring the identification of waters subject to effluent limitations. Try as they might, EPA and its supporters cannot create ambiguity out of this plain limitation. See *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 574 (9th Cir. 2000) (rejecting "the Government's invitation to create ambiguity from the statute's plain language"). To be sure, the CWA is a complex statute. But "complexity is not the same as ambiguity," and courts must "effectuate the legislative intent notwithstanding the contrary administrative view." *New York City Health & Hosp. Corp. v. Perales*, 954 F.2d 854, 862-63 (2d Cir. 1992); accord *Pennsylvania Med. Soc'y v. Snider*, 29 F.3d 886, 902 (3d Cir. 1994); *Meredith v. Federal Mine Safety &Health Review Comm'n*, 177 F.3d 1042, 1053 (D.C. Cir. 1999).

Thus, the Court "need not reach the second step of the *Chevron* analysis, because the traditional tools of statutory construction lead to a clear result." *Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994). But even if section 303(d)(1) could be deemed ambiguous, EPA's construction, which expands the *limited* class of substandard waters specified in section 303(d)(1)(A) to *all* substandard waters, would not warrant deference because it is not reasonable.

It is not reasonable because it reads a substantial chunk of section 303(d)(1)(A) – the restriction to waters subject to specific effluent limitations – out of the statute.

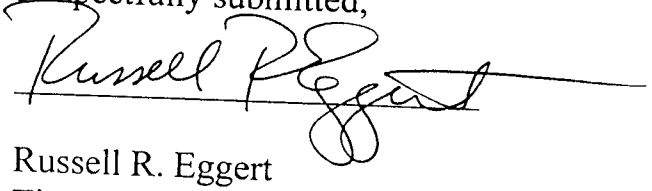
Its unreasonableness is underscored by the fact that, as we have shown, EPA did not articulate its current view that section 303(d)(1) applies to NPS-only impaired waters until some two decades after enactment. See *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (federal agency's "current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *SEIU v. County of San Diego*, 60 F.3d 1346, 1359 (9th Cir. 1995). Moreover, EPA's interpretation does "not warrant *Chevron*-style deference" because EPA did not subject its interpretation to notice and comment or other formal procedures. *Christensen v. Harris County*, 120 S. Ct. 1655, 1662-63 (2000). Finally, EPA's interpretation is unreasonable because, as we have shown and the record reflects, it compels federal intrusion into local land use matters, raising constitutionally troubling questions. See *SWANCC*, 2001 WL 15333, at *8 (no deference where administration interpretation of CWA raises "significant constitutional and federalism questions"); *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) (no deference where agencies "adopt a constitutionally troubling interpretation"). In short, there is no reason to defer to EPA's "redrafting" of the statute to fit its current policy predilections. *Natural Resources Defense Council*, 915 F.2d at 1322.

CONCLUSION

EPA and its supporters expend much ink on the desirability of clean water and the need to reduce NPS pollution. We fully agree with those sentiments, but none has any bearing on the issue before this Court. The question here is simply whether Congress intended to address NPS-only impaired waters through a particular tool, namely, federally mandated TMDLs. Recognizing that the plain text of the statute answers that question in the negative does not represent any surrender to NPS pollution or dirty water. There are many underutilized alternative means – some to be found in the CWA, some in state law – to address NPS pollution. EPA may prefer TMDLs, but until it convinces Congress, its preferences are not the law. For all the foregoing reasons, the decision of the district court should be reversed and judgment entered on behalf of plaintiffs-appellants.

January 11, 2001

Respectfully submitted,



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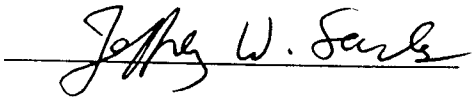
CERTIFICATE OF COMPLIANCE

I, Jeffrey W. Sarles, an attorney for plaintiffs-appellants, hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached Reply Brief of Plaintiffs-Appellants is proportionately spaced, has a type face of 14 points, and contains 6,228 words.

Jeffrey W. Sarles



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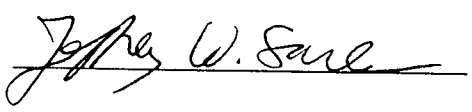

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