



An Agricultural Law Research Article

***Pronsolino v. Nastri*: Are TMDLs for Nonpoint Sources the Key to Controlling the “Unregulated” Half of Water Pollution?**

by

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Originally published in ENVIRONMENTAL LAW
33 ENVTL. L. 807 (2003)

www.NationalAgLawCenter.org

PRONSOLINO V. NASTRI: ARE TMDLS FOR NONPOINT SOURCES THE KEY TO CONTROLLING THE “UNREGULATED” HALF OF WATER POLLUTION?

BY
ERIN TOBIN*

In May 2002, the Ninth Circuit ruled in Pronsolino v. Nastri that the Total Maximum Daily Load (TMDL) provision of the Clean Water Act (CWA) authorized the Environmental Protection Agency (EPA) to list and develop a TMDL for the Garcia River in Northern California, polluted solely by nonpoint source pollution. The controversial decision established for the first time that sources of polluted runoff, such as logging, farming, and grazing, may be held accountable under the CWA for contributing to violations of state water quality standards, assuming a proactive EPA. This Chapter analyzes the Ninth Circuit’s opinion, criticizing the court for failing to rule that the TMDL provision clearly requires states and EPA to list and develop TMDLs for nonpoint source polluted waters. The Chapter further demonstrates that environmental plaintiffs should be able to use the Ninth Circuit’s decision to force EPA to list and set TMDLs for nonpoint source polluted waters when states and the agency fail to do so, and predicts that if EPA rescinds nonpoint source TMDLs in revised regulations, the regulations should fail to survive judicial scrutiny. The Chapter concludes that with congressional and EPA attention, the TMDL provision should provide a workable framework for nonpoint source pollution control.

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I. INTRODUCTION

Without dispute, nonpoint source pollution is the nation's leading water quality problem, contributing to nearly half of the water quality impairment nationwide.¹ Nonpoint source pollution commonly refers to polluted runoff from diffuse sources such as agricultural activities, timber harvest, urban development, and grazing.² Due in large part to the agricultural community's political clout in Congress,³ the 1972 Amendments to the Clean Water Act (CWA)⁴ only provided for direct federal regulation of point sources,⁵ leaving nonpoint source regulation primarily to state control. Polluted runoff flourished under this framework, benefiting from a lack of federal regulation,⁶ technical difficulties in identifying nonpoint sources, and a

¹ See U.S. EPA, 2000 NATIONAL WATER QUALITY INVENTORY REPORT 11 (2002) [hereinafter 2000 WATER QUALITY INVENTORY] (identifying runoff from agricultural activities as a cause of pollution in 48% of impaired waters).

² See U.S. GEN. ACCOUNTING OFFICE, WATER QUALITY: FEDERAL ROLE IN ADDRESSING—AND CONTRIBUTING TO—NONPOINT SOURCE POLLUTION 18, 20–23 (1999) [hereinafter GAO REPORT] (summarizing EPA's approach to managing nonpoint source pollution and identifying the federal government as a potential contributor to nonpoint source pollution).

³ See David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 515–16 (1996) (arguing that agricultural groups influenced Congress to produce lax nonpoint source controls in the CWA).

⁴ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

⁵ See 33 U.S.C. § 1311 (2000) (outlining federally mandated technology-based standards for point source dischargers).

⁶ Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. (ENVTL. L. INST.) 10,391, 10,399 (1997) [hereinafter *Long Road*] (maintaining that the primary reason nonpoint sources emerged as the leading water quality problem is that, unlike point sources, nonpoint sources were not subject to direct federal regulation).

deficiency of information about stream conditions.⁷ Nonetheless, in light of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"⁸ a federal role in nonpoint source pollution abatement is inescapable.

In an attempt to control polluted runoff effectively, citizen groups in the early 1990s used the CWA's Total Maximum Daily Load (TMDL) provision⁹ to force state implementation of water quality standards.¹⁰ Reacting to a barrage of citizen suits,¹¹ in 1992 the Environmental Protection Agency (EPA) asserted its presence in the nonpoint source arena by directing California to list seventeen rivers polluted solely by nonpoint sources as impaired under section 303(d)¹² of the CWA.¹³ EPA's actions were surprising considering the agency's historical failure to implement the TMDL program.¹⁴ When California did not meet EPA deadlines for setting TMDLs, fishing groups sued EPA; as a result the agency agreed to establish a TMDL for the Garcia River in northern California, which is polluted solely by nonpoint sources.¹⁵ Threatened timber interests immediately challenged EPA's actions, arguing that an EPA-developed TMDL for the Garcia River required land-use decision making, a task traditionally reserved to states.¹⁶

In August 2002, the United States District Court for the Northern District of California ruled in *Pronsolino v. Marcus*¹⁷ that EPA acted within its delegated authority under the CWA when it set TMDLs for the Garcia River.¹⁸ Further, the court ruled that section 303(d) unambiguously required

⁷ Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,329, 10,342 (1997) [hereinafter *Resurrection*] (outlining the origins of section 303 and the pitfalls in water quality based regulation of nonpoint sources).

⁸ 33 U.S.C. § 1251(a) (2000).

⁹ See 33 U.S.C. § 1313(d) (2000) (directing states to identify waters failing to meet water quality standards and develop total maximum daily loads for pollutants in impaired waters).

¹⁰ See discussion *infra* Part II.B.

¹¹ *Id.*

¹² 33 U.S.C. § 1313(d) (2000).

¹³ See *Pronsolino v. Nastri (Pronsolino)*, 291 F.3d 1123, 1129 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003) (discussing EPA's rejection of California's list of impaired waters for failing to include waters polluted solely by nonpoint sources).

¹⁴ See discussion *infra* Part II.B.

¹⁵ See U.S. EPA, GARCIA RIVER SEDIMENTATION TOTAL MAXIMUM DAILY LOAD (1998) [hereinafter GARCIA RIVER TMDL] (establishing the Garcia River TMDL), available at <http://www.epa.gov/region9/water/tmdl/garcia/garcia.pdf>.

¹⁶ See, e.g., *Pronsolino*, 291 F.3d at 1140 (discussing a challenge to EPA's order that California issue a TMDL for the Garcia River, polluted only by nonpoint sources, where plaintiffs argued that EPA "upset the balance of federal-state control established in the CWA by intruding into the states' traditional control over land use"). A second reason nonpoint sources have prospered is that the CWA does not provide for their direct federal regulation. A third is that for most of the past 30 years EPA focused on industrial and municipal point sources rather than addressing nonpoint source pollution. See generally Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,469, 10,472 (1999) (discussing the failure of state and local governments to implement water quality standards).

¹⁷ 91 F. Supp. 2d 1337 (N.D. Cal. 2000).

¹⁸ *Id.* at 1346-47.

that states set TMDLs for nonpoint source polluted waters.¹⁹ Focusing on the CWA's "comprehensive" approach to pollution control,²⁰ the court concluded that excluding nonpoint source polluted waters from section 303(d)'s requirements would create an unnecessary "chasm" in the CWA's pollution control scheme.²¹

In May 2002, the Ninth Circuit affirmed the district court's decision with *Pronsolino v. Nastri (Pronsolino)*,²² ruling that EPA's interpretation of section 303(d) to cover nonpoint source polluted waters was reasonable and entitled to deference.²³ Judge Berzon issued a conservative holding, avoiding the issue of EPA's clear duties under the CWA and ruling only that the statute authorized EPA to set a TMDL for the Garcia River.²⁴ The Ninth Circuit's decision nevertheless secured a role for TMDLs in nonpoint source pollution abatement when EPA chooses to assert itself, the effect of which (assuming an active EPA) may be felt in many Western states, where nonpoint source pollution far exceeds the national average.²⁵

This Chapter argues that, based on the text, structure, and purpose of the CWA, the Ninth Circuit should have decided *Pronsolino* at the first step of the test from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*²⁶ to give clear guidance to EPA that the agency has a mandatory duty under the CWA to require TMDLs for nonpoint source polluted waters in violation of water quality standards. Part II of this Chapter examines the context of the Ninth Circuit's decision in *Pronsolino*, outlining the scope of nonpoint source pollution nationally and in western states and the status of the CWA's TMDL program. Part III examines the factual and legal background of *Pronsolino*, explaining the reasoning of both the district court and the Ninth Circuit. Part IV analyzes the Ninth Circuit's decision in *Pronsolino* in depth, criticizing the court for failing to rule that the CWA clearly required that states set a TMDL for nonpoint source polluted waters, despite the overwhelming evidence supporting that conclusion. This section contrasts the district court and Ninth Circuit's opinions, concluding that the district court, and not the Ninth Circuit, properly analyzed EPA's obligations under section 303(d) of the CWA. Part V discusses the implications of Judge Berzon's decision, showing that the decision may allow EPA, now under a new administration, to change its interpretation of section 303(d) in new regulations. This section demonstrates, however, that a new interpretation of the TMDL requirement to exclude nonpoint source polluted waters likely would not withstand judicial scrutiny. Part VI discusses potential obstacles specific to nonpoint source TMDLs in the decision's aftermath. The Chapter

¹⁹ *Id.* at 1347.

²⁰ *Id.* at 1341-43, 1347, 1352, 1356.

²¹ *Id.* at 1347.

²² 291 F.3d 1123 (9th Cir. 2002).

²³ *Id.* at 1139.

²⁴ *Id.* at 1140-41.

²⁵ See discussion *intra* Part II.A.

²⁶ 467 U.S. 837 (1984). The first step of the test demands that "[i]f the intent of Congress is clear, that is the end of the matter," and the agency must act in accordance with that intent. *Id.* at 842-43.

concludes that while there are many uncertainties in the TMDL program, these uncertainties do not foreclose the possibility, suggested by the Ninth Circuit's decision in *Pronsolino*, that TMDLs can provide a workable framework for control of nonpoint source pollution.

II. BACKGROUND

A. Nonpoint Source Pollution

The diffuse nature of nonpoint source pollution is partly to blame for its pervasiveness.²⁷ Water—often from rain or snowmelt—creates nonpoint source pollution when it travels over land surfaces and picks up pollutants from diffuse sources.²⁸ Pollutants may collect in rivers or lakes, or may ultimately end up in coastal areas,²⁹ polluting beaches and estuaries. Polluted runoff from nonpoint sources typically results from activities such as agriculture, timber harvest, grazing, and urban development.³⁰ For instance, road building—at issue in *Pronsolino*—contributes to nonpoint source pollution by increasing soil erosion and mass soil movements (or landslides), which in turn increase sedimentation in rivers.³¹ Common types of nonpoint source pollutants include sediment, nutrients, pesticides, and bacteria.³² Unlike point source pollution, nonpoint source pollution does not emanate from “discrete conveyance[s],”³³ thereby complicating efforts to identify its source. In part because regulating nonpoint source pollution inherently calls for regulation of land-use practices, Congress left nonpoint source regulation largely to the states in the 1972 Amendments to the CWA.³⁴

Nonetheless, nonpoint source pollution is the primary obstacle to the achievement of Congress's goal of fishable and swimmable waters,³⁵ both nationwide and particularly in the West. In 1999, over one-third of waters

²⁷ Zaring, *supra* note 3, at 539–40 (discussing why Congress has avoided economic incentives and federal regulation in the nonpoint source context); *see also* *Resurrection*, *supra* note 7, at 10,342 (outlining the major obstacles EPA identified to controlling nonpoint source pollution).

²⁸ GAO REPORT, *supra* note 2, at 2.

²⁹ *Id.*

³⁰ GAO REPORT, *supra* note 2, at 18.

³¹ AYESHA ERCELAWN, NATURAL RES. DEF. COUNCIL, END OF THE ROAD—THE ADVERSE ECOLOGICAL IMPACTS OF ROADS AND LOGGING: A COMPILATION OF INDEPENDENTLY REVIEWED RESEARCH, CHAPTER 6: IMPACTS ON AQUATIC ECOSYSTEMS (1999), <http://www.nrdc.org/land/forests/roads/chap6.asp>.

³² GAO REPORT, *supra* note 2, at 18.

³³ 33 U.S.C. § 1362(14) (2000). The complete definition of “point source” is “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.* The CWA does not define nonpoint source pollution, but it is generally understood to be a broad category encompassing all pollution that does not come from a discrete conveyance. *See* WILLIAM H. RODGERS, ENVIRONMENTAL LAW 303 (2d ed. 1994) (describing the distinctions between point and nonpoint sources of pollution).

³⁴ GAO REPORT, *supra* note 2, at 20.

³⁵ 33 U.S.C. § 1251(a)(2) (2000).

nationwide failed to meet state water quality standards.³⁶ States and tribes identified agriculture as the leading source of pollution in forty-eight percent of impaired waters.³⁷ In 1995, one in every seven acres of classified shellfish beds was not approved for harvest due to water quality impairment.³⁸ Nonpoint sources caused eighty-five percent of shellfish bed closures (and in eight states, caused one hundred percent of the closures).³⁹ In the West, runoff from agricultural activities is the leading cause of stream impairment in most states (including Montana,⁴⁰ Arizona,⁴¹ California,⁴² Nevada,⁴³ New Mexico,⁴⁴ Colorado,⁴⁵ Utah,⁴⁶ and Wyoming⁴⁷). In Oregon, a staggering seventy-five percent of impaired waters are polluted solely by nonpoint sources.⁴⁸

Given their primary authority under the CWA to regulate nonpoint sources, states are largely responsible for the nonpoint source pollution problem that exists today. Even so, federal efforts to encourage state action have failed wholeheartedly.⁴⁹ In the CWA, Congress addressed nonpoint source pollution through section 208, dealing with area waste treatment management,⁵⁰ and section 319, specifically calling for nonpoint source management programs.⁵¹ In both programs, Congress made federal funding available to support the development of state nonpoint source controls (section 319 included additional reporting requirements and significantly

³⁶ GAO REPORT, *supra* note 2, at 18.

³⁷ 2000 WATER QUALITY INVENTORY, *supra* note 1, at 13. This percentage is a 4% increase from the 1998 National Water Quality Inventory Report. Both numbers are qualified by the fact that states and tribes only assessed 19% of rivers and streams in 2000 and 23% in 1998. *Id.*

³⁸ JACQUELINE SAVITZ, POINTLESS POLLUTION: PREVENTING POLLUTED RUNOFF AND PROTECTING AMERICA'S COASTS 12 (1999).

³⁹ *Id.* at 13.

⁴⁰ 2000 WATER QUALITY INVENTORY REPORT, *supra* note 1, at 130.

⁴¹ *Id.* at 80.

⁴² WATER QUALITY INVENTORY REPORT FOR THE STATE OF CALIFORNIA, http://oaspub.epa.gov/waters/w305b_report.state?p_state=CA#source (last updated July 10, 2003).

⁴³ 2000 WATER QUALITY INVENTORY REPORT, *supra* note 1, at 134.

⁴⁴ *Id.* at 140.

⁴⁵ *Id.* at 86.

⁴⁶ WATER QUALITY INVENTORY REPORT FOR THE STATE OF UTAH, http://oaspub.epa.gov/waters/w305b_report.state?p_state=UT#source (last updated July 10, 2003).

⁴⁷ WATER QUALITY INVENTORY REPORT FOR THE STATE OF WYOMING, http://oaspub.epa.gov/waters/w305b_report.state?p_state=WY#source (last updated July 10, 2003).

⁴⁸ OR. DEP'T OF ENVTL. QUALITY, 2001 NONPOINT SOURCE POLLUTION PROGRAM ANNUAL REPORT (2001), <http://www.deq.state.or.us/wq/nonpoint/NPSAnnualRpt01.pdf>.

⁴⁹ See Peter M. Lacey, *Addressing Water Pollution From Livestock Grazing After ONDA v. Dombeck: Legal Strategies Under the Clean Water Act*, 30 ENVTL. L. 617, 623-24 (2000) (asserting that the sections of CWA dealing with nonpoint source pollution, sections 319 and 208, have failed because they are largely driven by federal grants and do not provide EPA with enforcement authority).

⁵⁰ 33 U.S.C. § 1288 (2000).

⁵¹ *Id.* § 1329.

more funding)⁵² and left enforcement and implementation to the states.⁵³ As the statistics for nonpoint source contributions to the nation's water quality problems demonstrate, these programs have failed to produce clean water.⁵⁴ Given the national scope of polluted runoff, TMDLs present an alternative solution that provides increased federal oversight over nonpoint sources without divesting states of their primary regulatory authority.

B. Total Maximum Daily Loads

The TMDL provision at issue in *Pronsolino* came into existence quietly as part of the 1972 Amendments to the Clean Water Act.⁵⁵ The 1972 Amendments worked a major shift in pollution control by imposing federal regulation on individual point source dischargers through effluent limitations administered by a national permit program.⁵⁶ Since Congress was concerned primarily with point sources when drafting the 1972 Amendments, few paid much notice to the TMDL provision buried in the back of section 303, relating to water quality standards.⁵⁷ Despite dissatisfaction with the previous water quality based program,⁵⁸ Congress retained the pre-1972 state operated program as a "safety net" in order to ensure that water quality would actually be achieved where technology-based standards were not sufficient.⁵⁹

Section 303(d) is an important component of the water quality based program because it requires states to maintain and submit to EPA a list of waters for which technology-based effluent limitations "are not stringent enough" to implement any state water quality standard.⁶⁰ Once a waterbody is listed, states must develop TMDLs for all pollutants at a level necessary to achieve water quality standards.⁶¹ EPA regulations define a TMDL as the sum of the point source wasteload allocation, nonpoint source load allocation, and background for a particular pollutant.⁶² Thus, a TMDL distributes the load for a particular pollutant among the various point and nonpoint sources necessary to achieve water quality standards.

⁵² U.S. EPA, MODIFICATIONS TO NONPOINT SOURCE REPORTING REQUIREMENTS FOR SECTION 319 GRANTS, available at <http://www.epa.gov/owow/nps/Section319/grts.html> (last updated Jul. 25, 2002).

⁵³ 33 U.S.C. §§ 1288, 1329 (2000).

⁵⁴ See *supra* note 1.

⁵⁵ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 848-49 (codified as amended at 33 U.S.C. § 1313(d)(1)(C) (2000)).

⁵⁶ *Long Road*, *supra* note 6, at 10,391.

⁵⁷ See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 848-49 (codified as amended at 33 U.S.C. § 1313 (d)(1)(C) (2000)).

⁵⁸ See, e.g., *Env'tl. Def. Fund v. Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981) ("The Amendments were enacted, in part, from a recognition in Congress of the lack of efficacy of the existing water quality standards as the major vehicle for pollution control and abatement").

⁵⁹ Oliver A. Houck, *The Clean Water Act TMDL Program: Aftershock and Prelude*, 32 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,385, 10,405 (2002) [hereinafter *Aftershock*] (outlining the context of the TMDL program).

⁶⁰ 33 U.S.C. § 1313(d)(1)(A) (2000).

⁶¹ *Id.* § 1313(d)(1)(C).

⁶² 40 C.F.R. § 130.2(h) (2002).

For instance, California set water quality standards for the Garcia River to protect cold-water fish habitat and allow for fish migration, spawning, and development.⁶³ The Garcia River violated these water quality standards because it contained levels of sedimentation that adversely affected its designated uses. Consequently, the Garcia River TMDL, set by EPA when California failed to act, established load allocations for sedimentation among the following categories: 1) mass wasting (or landslides) associated with forest practices, 2) mass wasting associated with roads, 3) erosion associated with roads, and 4) erosion related to road and skid trail crossing.⁶⁴ The TMDL further called for an overall reduction in sedimentation by sixty percent in order to comply with water quality standards for the Garcia River.⁶⁵

While states are primarily responsible for listing impaired waters and developing TMDLs, EPA has approval authority over both section 303(d) lists and TMDLs.⁶⁶ EPA must also develop a section 303(d) list or TMDL if the agency disapproves a state's submission.⁶⁷ The states must then incorporate TMDLs into a "continuing planning process," a state's overall plan for pollution abatement,⁶⁸ which is also subject to EPA approval.⁶⁹

EPA's proactive listing of the Garcia River demonstrated the agency's desire to get ahead of numerous citizen suits over TMDLs.⁷⁰ Litigation proved to be an important tool for citizens to force EPA to take the TMDL program seriously, which the agency did not do until well into the 1990s.⁷¹ In fact, EPA only set the Garcia River TMDL pursuant to a court-ordered consent decree.⁷² Other examples of EPA's belated efforts include the creation of a Federal Advisory Committee in 1996 to analyze the role of the TMDL program,⁷³ an attempt to develop comprehensive TMDL regulations in July 2000,⁷⁴ and revisions to section 319 guidance documents in 2001, which

⁶³ GARCIA RIVER TMDL, *supra* note 15, at 8. California's water quality criteria (established to protect designated uses) required that sedimentation in the Garcia River should not "cause nuisance or adversely affect" beneficial uses. *Id.* at 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 33 U.S.C. § 1313(d)(2) (2000).

⁶⁷ *Id.*

⁶⁸ *Id.* at § 1313(e)(3)(C).

⁶⁹ *Id.* at § 1313(e)(2).

⁷⁰ *Long Road*, *supra* note 6, at 10,397.

⁷¹ For a thorough discussion of the TMDL litigation, see Oliver A. Houck, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION*, 49-58 (2d ed. 2002). See also Dianne K. Conway, *TMDL Litigation: So Now What?*, 17 VA. ENVTL. L. J. 83, 93 (1997); Lacey, *supra* note 49, at 628-30 (outlining the history of TMDL enforcement); *Long Road*, *supra* note 6, at 10,391.

⁷² See *Pronsolino*, 291 F.3d 1123, 1129 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003) (citing consent decree between Pacific Coast Federation of Fishermen's Associations and EPA).

⁷³ Robert W. Adler, *Controlling Nonpoint Source Water Pollution: Is Help On The Way (From The Courts or EPA)?*, 31 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,270, 10,280 (2001) (discussing the role the Federal Advisory Committee played in formulating EPA's revised TMDL regulations).

⁷⁴ In July 2000, EPA significantly amended its TMDL regulations. The new regulations required development of TMDLs for waterbodies polluted purely by nonpoint sources, included implementation plans as part of the TMDL, and imposed compliance schedules. See *Revisions*

set aside a portion of section 319 funding for nonpoint source TMDLs and implementation plans.⁷⁵ EPA's efforts ultimately led to a backlash of litigation by nonpoint source interests, exemplified by the Pronsolinos' challenge to EPA's authority to set a TMDL for the Garcia River.

III. THE NINTH CIRCUIT'S DECISION IN *PRONSOLINO*. FACTUAL AND LEGAL CONTEXT

A. *Factual Background*

The Garcia River, which drains a forested watershed in Northern California,⁷⁶ once "flourished" as a spawning and migratory habitat for many species of cold-water fish, including salmon (*Oncorhynchus spp.*) and steelhead (*O. mykiss*).⁷⁷ Coho salmon (*O. kisutch*) inhabited as many as 582 streams in California,⁷⁸ and in 1960 an estimated two hundred coho spawned in the Garcia River watershed alone.⁷⁹ Only 200 wild coho remain in the river today.⁸⁰ A long history of logging in Northern California forests severely degraded salmon spawning habitat, at least partially causing the

to the Water Quality Planning and Management Requisition and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,665, 43,668 (July 13, 2000). After court challenges from nonpoint source interests and environmentalists, EPA proposed to withdraw the regulations to reconsider the TMDL rule altogether. Withdrawal of Revisions to the Revisions to the Water Quality Planning and Management Requisition and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation 68 Fed. Reg. 13,608 (Mar. 19, 2003). In March 2003, EPA announced its decision to formally withdraw the TMDL rule, signaling the final end of the 2000 rule. Press Release, U.S. EPA, Final Withdrawal of 2000 TMDL Rule Takes Effect, Existing Rules Make Progress Cleaning Up Impaired Waters (March 13, 2003), <http://yosemite.epa.gov/opa/admpress.nsf/0/601385d1f25da12485256ce80024d38?OpenDocument>.

⁷⁵ See *Aftershock*, *supra* note 59, at 10,398 (discussing the 2001 revisions to EPA's section 319 guidance). EPA revised its section 319 guidance again in 2002, relaxing the requirements for nonpoint source TMDLs and implementation plans by allowing the funds to be used for watershed-basin plans instead. U.S. EPA, Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003, 67 Fed. Reg. 54,806 (Aug. 26, 2002) [hereinafter EPA FY 2003 § 319 Guidance], *available at* <http://www.epa.gov/owow/nps/Section319/319gulde03.html>.

⁷⁶ GARCIA RIVER TMDL, *supra* note 15, at 8.

⁷⁷ *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1338–39 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003). The National Marine Fisheries Service ultimately listed these two species as threatened under the Endangered Species Act in 1996 and 1998, respectively. *Id.*; see also Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56,138 (Oct. 31, 1996) (listing central California coast coho salmon evolutionarily significant unit (ESU) as threatened); Endangered and Threatened Species: Threatened Status for Two ESUs of Steelhead in Washington, Oregon, and California, 63 Fed. Reg. 13,347 (Mar. 19, 1998) (listing the Central Valley, California steelhead ESU as threatened).

⁷⁸ GARCIA RIVER TMDL, *supra* note 15, at 9.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.*

decline of both coho salmon and steelhead by contributing to lethal levels of sedimentation in the Garcia River.⁸¹

Recognizing the importance of these species, California established water quality standards for the Garcia River to protect cold-water fish and their habitat.⁸² Based on these standards, in 1992, EPA directed California to add the Garcia River and sixteen other segments to the state's section 303(d) list of impaired waters.⁸³ In 1995, after neither California nor EPA set a TMDL for any of the seventeen rivers, environmental and fishing groups sued EPA to force the agency to set a TMDL for the Garcia River.⁸⁴ As a result, EPA agreed to establish a TMDL for the Garcia River by March 18, 1998 if California did not.⁸⁵ When California failed to set the TMDL by the agreed deadline, EPA established a TMDL for the Garcia River.⁸⁶

The Pronsolinos own private forestland in the Garcia River watershed in Mendocino County.⁸⁷ With the intention to harvest timber on their land, the couple obtained harvest permits from the California Department of Forestry, which imposed numerous conditions on the Pronsolinos' logging plans to comply with the Garcia River TMDL.⁸⁸ As a result, in August 1999, the Pronsolinos sued EPA, challenging the agency's authority to list and establish a TMDL for the Garcia River.⁸⁹

B. Chevron Deference and its Progeny

Judge Berzon of the Ninth Circuit recognized the difficult question of whether and what kind of deference to afford EPA's interpretation of section

⁸¹ *Id.* at 8, 11. The Garcia River TMDL identified geologic instabilities in addition to past and present land use activities as causes of elevated sedimentation in the Garcia River. *Id.* at 8.

⁸² *Id.*

⁸³ *Pronsolino*, 291 F.3d 1123, 1129 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

⁸⁴ *Id.* (citing *Pac. Coast Fed'n of Fishermen's Ass'ns. v. Marcus*, No. 95-4474 (N.D. Cal. 1997)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1129-30. The harvest permit outlined numerous prescriptions to comply with the Garcia River TMDL, including directing the Pronsolinos to

- a) inventory controllable sediment sources from all roads, landings, skid trails and agricultural facilities by June 1, 2002; b) mitigate 90% of controllable sediment volume at 'road related' inventoried sites by June 1, 2012; c) prevent sediment loadings caused by road construction; d) retain five conifer trees greater than 32 inches in diameter at breast height . . . per 100 feet of all Class I and Class II watercourses (if the site lacks enough trees to comply, the five largest trees per 100 feet must be retained); e) harvest only during dry, rainless periods between May 1 and October 15; f) refrain from constructing or using skid trails on slopes greater than 40 degrees within 200 feet of a watercourse; and g) forbear from removing trees from certain unstable areas which have a potential to deliver sediment to a watercourse.

Id. at 1130 n.6. Compliance with the permit's requirement that large conifer trees be retained would cost the Pronsolinos an estimated \$750,000. *Id.*

⁸⁹ *Id.* The Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation joined the Pronsolinos as plaintiffs in the suit. *Id.*

303(d) of the CWA.⁹⁰ Assuming that a statutory provision is unclear, the level of deference a court affords an agency interpretation falls on a spectrum of choices depending on the context of the administrative interpretation.⁹¹ Supreme Court guidance on an agency's authority to interpret statutory provisions, and the judicial deference necessitated by such authority, is helpful when considering the soundness of the Ninth Circuit's decision.

In 1984, the Supreme Court issued the landmark decision *Chevron*, ruling that Congress may explicitly or implicitly delegate authority to administrative agencies to interpret ambiguous statutory provisions or to fill gaps in statutes Congress authorized the agency to administer.⁹² In *Chevron*, the Supreme Court recognized that when Congress expects an agency to "fill the gaps," a court may only overturn agency interpretations that are clearly unreasonable, not decisions the court simply thinks are unwise.⁹³ Dubbed the "*Chevron* two-step,"⁹⁴ a reviewing court must first consider whether the statute is clear or unambiguous, because if so, "that is the end of the matter."⁹⁵ If the statute is ambiguous, however, an agency's interpretation of the statute promulgated pursuant to the agency's congressionally delegated⁹⁶ rulemaking authority is entitled to deference as long as it is reasonable.⁹⁷

⁹⁰ See *id.* at 1130 (noting that the appropriate level of deference was a "harder" question to answer than the scope of review). A threshold issue for the court was whether EPA's interpretation was embodied in the agency's TMDL regulations, in other administrative documents, or asserted for the first time when the agency directed California to list the Garcia River as impaired in 1992. See discussion *infra* Part II.E.

⁹¹ See *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001) (acknowledging that even if an agency's interpretation of a statute is not embodied in notice-and-comment rulemaking, the agency still may be entitled to deference based on the persuasiveness of its reasoning).

⁹² *Chevron*, 467 U.S. 837, 842–45 (1984).

⁹³ *Mead*, 533 U.S. at 229 (citing *Chevron*, 467 U.S. at 842–45, which held that a "reviewing court shall set aside agency action, findings, and conclusions found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'").

⁹⁴ See, e.g., William S. Jordan III, *United States v. Mead: Complicating the Delegation Dance*, 31 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 11,425 (2001) (using the dance metaphor).

⁹⁵ *Chevron*, 467 U.S. at 842. The relevant text reads:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.

Id. at 842–43.

⁹⁶ Congress may delegate rulemaking authority to the interpreting agency explicitly or implicitly. *Mead*, 533 U.S. at 226–27, 229 ("[a]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

⁹⁷ *Chevron*, 467 U.S. at 844–45. Exactly how a court evaluates the reasonableness of an agency interpretation is unclear. The Supreme Court has never overruled an agency's interpretation of a statute at the second step of *Chevron*. For further discussion of this issue see

Agencies interpreting their own regulations are owed a similarly high level of deference from courts. In *Bowles v. Seminole Rock (Seminole Rock)*,⁹⁸ the Supreme Court recognized that an agency's interpretation of its own regulation, demonstrated in administrative interpretative documents, is entitled to deference unless plainly erroneous.⁹⁹ In *Seminole Rock*, the Court examined guidance documents the Office of Price Administration sent to regulated manufacturers, and concluded that, based on the Court's reading of the disputed regulation and the agency's "consistent" interpretation of the regulation, the agency's interpretation applied.¹⁰⁰

Subsequent Supreme Court decisions clarified the scope of *Chevron* deference, limiting the circumstances to which *Chevron* applies, but recognizing that courts may afford less rigorous deference to agency interpretations not worthy of *Chevron* deference but nonetheless persuasive.¹⁰¹ In *United States v. Mead Corp. (Mead)*, the Court emphasized that not all agency interpretations are entitled to the generous deference set forth in *Chevron*, noting that a strong indicator of *Chevron*-level deference is whether the agency interpretation was promulgated in notice-and-comment rulemaking or adjudications that promulgate agency rules.¹⁰² Absent these circumstances, however, the *Mead* Court emphasized that under *Skidmore v. Swift & Co. (Skidmore)*,¹⁰³ a reviewing court may look to other factors, such as the "agency's care [in its consideration], its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position," to decide whether the agency's interpretation merits deference.¹⁰⁴ The Court in *Mead* acknowledged that, given an agency's duty to interpret and administer a statute, an administrative agency's interpretation may influence a court's construction of an ambiguous statutory provision even though it is not binding on the court.¹⁰⁵

Given this framework, the Ninth Circuit in *Pronsolino* faced three specific questions when deciding whether EPA acted within its statutory authority when it required a TMDL for the Garcia River. First, does the CWA unambiguously express Congress's intent that states or EPA develop TMDLs for waters polluted solely by nonpoint sources? If so, the court's analysis must cease, and the reasonableness or persuasiveness of EPA's interpretation of section 303(d) is irrelevant because Congress clearly expressed its intent in the CWA.¹⁰⁶ Second, if Congress's intent is unclear,

Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1260-62 (1997) [hereinafter *Anatomy of Chevron*] (questioning the purpose of a reasonableness evaluation if an agency's interpretation of a statute is consistent with congressional intent).

⁹⁸ 325 U.S. 410 (1945).

⁹⁹ *Id.* at 414.

¹⁰⁰ *Id.*

¹⁰¹ *Mead*, 533 U.S. at 227 (noting that although a Customs ruling did not qualify for *Chevron*-level deference, the ruling may garner deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

¹⁰² *Id.* at 227, 229-30.

¹⁰³ 323 U.S. 134 (1944).

¹⁰⁴ *Mead*, 533 U.S. at 228.

¹⁰⁵ *Id.* at 217.

¹⁰⁶ *Chevron*, 467 U.S. 837, 842-43 (holding that "[i]f the intent of Congress is clear, that is the

then the court must decide whether EPA promulgated its interpretation of section 303(d) in notice-and-comment regulations, thus warranting *Chevron* deference unless unreasonable. Third, if EPA's interpretation appeared in less formal policy documents not subject to notice-and-comment rulemaking, then under *Skidmore* the court may consider the persuasiveness of EPA's interpretation to decide whether the interpretation warrants deference. Because the Ninth Circuit failed to address whether Congress clearly expressed its intent in the CWA, the court's ultimate outcome misapplied the Supreme Court's guidance in *Chevron* and *Mead*.

C. Section 303(d)—The Statutory Provision in Controversy

The issue in *Pronsolino* was whether section 303(d)(1)(A) directed states, and by default EPA,¹⁰⁷ to list as impaired those waters polluted solely by nonpoint source pollution.¹⁰⁸ Under section 303(d)(1)(A), states must maintain a list of waters "for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] are not stringent enough to implement any water quality standard applicable to such waters."¹⁰⁹ For all segments listed as impaired, states must establish TMDLs "for those pollutants the Administrator identifies . . . [as] suitable for such calculation . . . at a level necessary to implement the applicable water quality standards."¹¹⁰ In other words, section 303(d)(1)(C)¹¹¹ directs states to develop TMDLs for pollutants in all waters listed under section 303(d)(1)(A).¹¹²

D. Stakeholders' Interpretations of Section 303(d)

The Pronsolinos made two attacks on EPA's interpretation of section 303(d), arguing that the CWA did not require listing under section 303(d)(1)(A), or TMDLs under section 303(d)(1)(C), for waters polluted solely by nonpoint source pollution. First, they argued that EPA was not

end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

¹⁰⁷ The CWA commands EPA to establish a section 303(d)(1)(A) list if it disapproves a state's list. See 33 U.S.C. § 1313(d)(2) (2000) (requiring that if EPA disapproves a state's list, it "shall . . . identify such waters in such State and establish such loads for such waters as [it] determines necessary to implement the water quality standards applicable to such waters.") (emphasis added).

¹⁰⁸ The district court reached an argument unaddressed by the Ninth Circuit: Whether section 303(d)(1)(C) precluded TMDLs for nonpoint sources of pollution because it directed states to establish TMDLs for "pollutants." As discussed *infra* Part III.D, the district court dismissed this argument because the statutory definition of "pollutant" was ambiguous, and, at a minimum, EPA's interpretation of the term to include nonpoint sources of pollution was reasonable. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1338–39 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

¹⁰⁹ 33 U.S.C. § 1313(d)(1)(A) (2000).

¹¹⁰ *Id.* § 1313(d)(1)(C).

¹¹¹ *Id.*

¹¹² *Id.* § 1313(d)(1)(A).

entitled to deference because EPA's regulations did not direct states to set TMDLs for waters polluted solely by nonpoint sources, and that EPA inconsistently interpreted section 303(d) in internal policy documents.¹¹³ Second, they claimed that EPA should not be afforded *Chevron* deference because the CWA clearly prohibited EPA's authority to list and set TMDLs for waters polluted solely by nonpoint sources.¹¹⁴ The Pronsolinos maintained that section 303(d) expressly limited the listing requirement to waters for which effluent limitations "are not stringent enough" to implement applicable water quality standards.¹¹⁵ Because effluent limitations apply only to point sources,¹¹⁶ the Pronsolinos maintained that only those waters with point source discharges should be listed under section 303(d).¹¹⁷ They further reasoned that in the 1972 Amendments Congress intended the CWA to target point source discharges, leaving control of nonpoint sources to state regulation.¹¹⁸ The sole purpose of water quality standards, under this theory, is to allow for the adjustment of controls over point source discharges. Under this view, allowing EPA to set TMDLs for waters polluted solely by nonpoint sources would frustrate a clear "balance" between state and federal control.¹¹⁹

EPA disagreed with the Pronsolinos, asserting that the CWA directed the agency to set TMDLs for nonpoint source polluted waters and, at a minimum, that the court owed the agency's interpretation of the statute *Chevron* deference.¹²⁰ From EPA's perspective, a state's obligation to prepare a TMDL for any impaired water (regardless of the source of pollution) was triggered after that state implemented effluent limitations on all point source discharges within its boundaries.¹²¹ Structurally, EPA argued that Congress placed section 303(d) in the water quality based portion of the statute, which does not distinguish between sources of pollution.¹²² In the alternative, EPA argued that the language of section 303(d) was ambiguous,

¹¹³ *Pronsolino*, 291 F.3d 1123, 1131 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

¹¹⁴ *Id.* at 1135.

¹¹⁵ *Id.* (quoting 33 U.S.C. § 1313(d)(1)(A) (emphasis added by 9th Circuit)).

¹¹⁶ The CWA defines effluent limitation to mean "any restriction established by a state or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362 (2000).

¹¹⁷ *Pronsolino*, 291 F.3d at 1135. The Pronsolinos explained that a "mixed" water (impaired by both point and nonpoint sources) should be listed under section 303(d) (for the point source discharge) and section 319 (for the nonpoint source discharge), and that the state (and/or EPA in the case of point sources under section 303(d)) should address each source pursuant to the appropriate section. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1346 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003). Thus, even though on the facts of the case the Pronsolinos contested application of TMDLs to only nonpoint source polluted waters, the Pronsolinos maintained that even in mixed waters nonpoint sources did not fall within the purview of section 303(d).

¹¹⁸ *Pronsolino*, 291 F.3d at 1140.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1131.

¹²¹ *Id.* at 1135.

¹²² Brief for Federal Appellees at 33, *Pronsolino* (Nos. 00-16026 & 00-16027) [hereinafter Brief for Federal Appellees].

and the structure and purpose of the CWA supported the agency's interpretation as reasonable.¹²³ EPA's argument was grounded on the notion that technology-based effluent limitations on point sources merely supplemented the water quality based program. Underscoring EPA's perspective is the belief that Congress chose to focus on point source discharges as the primary, but not exclusive, mechanism to achieve the national goal of clean water.¹²⁴

E. The District Court Decision

In August 2000, Judge Alsup, District Judge for the Northern District of California, ruled that the CWA allowed EPA to develop a TMDL for the Garcia River.¹²⁵ The court held that it was unnecessary to consider the reasonableness of EPA's interpretation of section 303(d) because the CWA made clear that Congress intended states and EPA to list and set TMDLs for waters polluted by all sources of pollution.¹²⁶ The district court based its decision largely on Congress's intention for a "comprehensive" statutory scheme when passing the 1972 Amendments to the CWA.¹²⁷ Judge Alsup reasoned that the CWA required TMDLs as part of the states' continuing planning obligations under section 303(e)¹²⁸ and implementation of applicable water quality standards¹²⁹—which required consideration of nonpoint source pollution.¹³⁰ Structurally, Judge Alsup reasoned that Congress placed the TMDL provision in section 303, titled "Water Quality Standards and Implementation Plans," which obligates states to set water quality standards for all navigable waters.¹³¹ Further, section 303(d) directed states to first "identify those waters within its boundaries," suggesting that

¹²³ *Id.* at 38.

¹²⁴ *See, e.g.,* *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1347 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003). ("The 1972 Act superimposed the technology-driven mandate of point-source effluent limitations . . . To have excluded the large number of rivers and waters polluted solely by agricultural and logging runoff would have left a chasm in the otherwise 'comprehensive' statutory scheme.")

¹²⁵ *Id.* at 1356.

¹²⁶ *Id.* at 1347.

¹²⁷ *Id.* at 1341 (pointing out that the Supreme Court has consistently used the word "comprehensive" to describe the 1972 Clean Water Act Amendments); *see also id.* at 1347 ("To have excluded the large number of rivers and waters polluted solely by agricultural and logging runoff would have left a chasm in the otherwise 'comprehensive' statutory scheme.")

¹²⁸ 33 U.S.C. § 1313(e) (2000) (directing the Administrator to "approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within the State").

¹²⁹ *Id.* § 1313(d) (directing states to establish TMDLs for waters listed under section 303(d) as impaired at a level "necessary to implement the applicable water quality standards with seasonal variations and a margin of safety").

¹³⁰ The court noted that failing to set TMDLs for nonpoint sources of pollution "would frustrate the 'comprehensive approach' adopted by the 1972 Act." *Pronsolino v. Marcus*, 91 F. Supp. 2d at 1347 (citing *Natural Res. Def. Council, Inc. v. Fox*, 909 F. Supp. 153, 156 (S.D.N.Y. 1995)).

¹³¹ *Id.* The court noted that all parties agreed that water quality standards should be set for all navigable waters within a state. *Id.* at 1343.

the starting point of section 303(d) was identification of all substandard waters.¹³² The court interpreted section 303(d), directing states to list waters for which "effluent limitations would not be stringent enough," to mean that states should exclude from the 303(d) list only waters "redeemable" through the imposition of effluent limitations.¹³³

Judge Alsup relied on the unreasonableness of the *Pronsolinos'* interpretation of section 303(d) as support for his conclusion that the CWA clearly required nonpoint source TMDLs.¹³⁴ The court emphasized that to exclude waters polluted solely by nonpoint sources would leave a "chasm in the otherwise 'comprehensive' statutory scheme" set out by Congress.¹³⁵ Further, the *Pronsolinos'* construction would jeopardize states' continuing planning processes, which the CWA expressly requires to take into account all sources of pollution.¹³⁶ In the court's view, the language of section 303(d) simply reflected Congress's focus on the technology-based effluent limitations as a first line of attack on pollution; the statute still obligated the states to address any remaining "unfinished business"—regardless of sources of pollution—through section 303(d) lists and TMDLs.¹³⁷ Judge Alsup held that Congress clearly expressed its intent in the CWA that TMDLs apply to waters polluted solely by nonpoint sources, and therefore there was no need for him to evaluate the reasonableness of EPA's construction of the statute.¹³⁸

¹³² *Id.* at 1347 (internal quotation marks omitted).

¹³³ *Id.* The court admitted one qualification to its point that section 303(d) required states to set TMDLs for all navigable waters: Section 303(d)(1)(C) directs states to establish TMDLs for all suitable "pollutants." *Id.* at 1351. The court focused on whether the term "pollutants" implicated a distinction between point and nonpoint sources of pollution. *Id.* at 1351–52. The court noted that the CWA defines "pollutant" to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar, dirt and industrial, municipal and agricultural waste discharged into water." *Id.* at 1351 (emphasis added by 9th Circuit). The court noted that the Ninth Circuit already determined that sediment, at issue in the *Pronsolino* case, is a pollutant. *Id.* (citing *Ryback 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) (where TMDL was prepared for sediment)). The court then acknowledged that the Ninth Circuit ruled in *Natural Desert Ass'n v. Dombeck* that "discharge" in the section 401 state certification process required a discharge of a pollutant through a point source, but thought that the statutory definition of "pollutant" was ambiguous because it was unclear whether "discharged into water" qualified the entire list or only "industrial, municipal and agricultural waste." *Id.* at 1351–52. The court further noted multiple references in the CWA to nonpoint sources of "pollutants," and ultimately determined that Congress's intended meaning of "pollutant" was at a minimum ambiguous and EPA's understanding of "pollutant" to encompass nonpoint source pollution was entitled to *Chevron* deference. *Id.* at 1352.

¹³⁴ *Id.* at 1347.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* The court stated in a footnote that "[f]or these three reasons, the Court finds that Congress has directly spoken to the precise question at issue. There is, therefore, no need to resort to supplemental aids of construction." *Id.* at 1347 (citing *Chevron*, 467 U.S. 837, 842–45 (1984)). Judge Alsup noted that his decision was consistent with Ninth Circuit case law, notably the Ninth Circuit's decision in *Dioxin/Organochlorine Center v. Clarke (Dioxin)*, in which the court ruled that Congress authorized EPA to establish TMDLs for dioxin, a toxic pollutant, even

F. The Ninth Circuit Finds EPA's Interpretation Reasonable

In May 2002, the Ninth Circuit affirmed the district court's decision, ruling that the CWA authorized EPA to set a TMDL for the Garcia River.¹³⁹ Although Judge Berzon conducted a thorough textual analysis of section 303(d), she failed to make clear conclusions concerning whether the court owed EPA deference, and if so, what type.¹⁴⁰ Acknowledging that EPA's TMDL regulations¹⁴¹ demonstrated the agency's interpretation of section 303(d), the court nonetheless generally concluded that EPA was entitled to some amount of deference, either under *Chevron* or *Skidmore*.¹⁴² More importantly, Judge Berzon failed to establish whether section 303(d) of the CWA was ambiguous in the first place, calling into question whether it was even necessary to defer to EPA's interpretation, and leaving unanswered whether the statute *required* EPA to set TMDLs for solely nonpoint source polluted waters in the future.¹⁴³

The court initially held that EPA's interpretation of section 303(d) set out in its TMDL regulations was entitled to *Chevron* deference, based on the agency's delegated authority to interpret the CWA and the agency's understanding of its TMDL regulations.¹⁴⁴ Judge Berzon established that the agency's interpretation of section 303(d) was embodied in notice-and-comment regulations because the regulations clearly called for stream listing

though technology-based limitations referenced in section 303(d) do not apply to toxic pollutants. 57 F.3d 1517, 1528 (9th Cir. 1995). The district court was unpersuaded by the Pronsolinos' legislative history argument because section 303(d)'s legislative history merely showed that Congress intended to use water quality standards to adjust point source effluent limitations but did not demonstrate that Congress intended to *exclude* nonpoint sources from the section's requirements. *Pronsolino v. Marcus*, 91 F. Supp. 2d at 1349.

¹³⁹ *Pronsolino*, 291 F.3d 1123, 1140–41 (2002), *cert. denied*, 123 S. Ct. 2573 (2003).

¹⁴⁰ The court made several contradictory statements throughout its analysis concerning on what step of *Chevron* it based its holding. In its conclusion, the court stated that section 303(d) was "best read" to include consideration of nonpoint source pollution when listing a water as impaired. *Id.* However, the court continued that EPA's reasonable interpretation of section 303(d) was entitled to deference "to the extent the statute is ambiguous—which is not very much." *Id.* In addition, at the summation of the court's statutory analysis, it stated that because EPA's interpretation was "considerably more convincing" than the Pronsolinos', it was unnecessary to consider legislative history arguments. *Id.* at 1139. The court cited *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 132–33 (2002), in which the Supreme Court held that when the text of a statute is unambiguous, courts need not consider legislative history. The Ninth Circuit's reference to the Supreme Court's decision suggests that the court viewed section 303(d) as requiring listing and TMDLs for nonpoint source polluted waters. *Id.* Nonetheless, the court concluded only that EPA did not exceed its statutory authority, deferring to EPA's interpretation of section 303(d) under either *Chevron* or *Skidmore*. *Id.* at 1141.

¹⁴¹ 40 C.F.R. § 130.0–130.15 (2002).

¹⁴² *Pronsolino*, 291 F.3d at 1141.

¹⁴³ While statutory analysis is typically conducted at step one of *Chevron* to determine whether congressional intent is clear in the statute, Judge Berzon concluded her statutory analysis by finding EPA's interpretation of section 303(d) to be "not only entirely reasonable but considerably more convincing than the one offered by plaintiffs," suggesting that she used the statutory text to demonstrate the reasonableness of EPA's interpretation. *Id.* at 1139.

¹⁴⁴ *Id.* at 1133.

and TMDLs for nonpoint source polluted waters.¹⁴⁵ EPA regulations define a TMDL to be the “sum of the individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.”¹⁴⁶ The court reasoned that because the wasteload allocation for point sources could conceivably be zero, the regulations authorized a TMDL when there is only a nonpoint source load allocation.¹⁴⁷ Moreover, EPA regulations direct states to identify segments that require TMDLs if “[o]ther pollution control requirements (e.g., best management practices) . . . are not stringent enough”¹⁴⁸ where best management practices only relate to nonpoint source pollution, thereby mandating listing of segments polluted solely by nonpoint sources.¹⁴⁹ Consequently, the court was convinced that EPA’s understanding of section 303(d) was “reflect[ed]” in its regulations, rendering EPA’s interpretation worthy of *Chevron* deference.¹⁵⁰

Nonetheless, in what appears to be dicta, the court upheld EPA’s interpretation of section 303(d) under the *Skidmore* standard as well.¹⁵¹ Judge Berzon noted the “intricate statutory scheme” and the “technically complex environmental issues” involved,¹⁵² concluding that deference was appropriate under *Skidmore* because Congress delegated to EPA the responsibility to approve state 303(d) lists, EPA possessed specialized experience in pollution control, and the agency consistently interpreted section 303(d) in its regulations and internal policy documents.¹⁵³ In particular, Judge Berzon reasoned that EPA’s definition of a “water quality limited segment” (one requiring a TMDL) to include waters polluted solely by nonpoint source pollution had been in effect since 1973.¹⁵⁴ She explained that EPA’s failure to require a nonpoint source TMDL until 1992 was only a reflection of the agency’s general failure to implement the TMDL program in light of EPA’s focus on point source effluent limitations.¹⁵⁵

To support her decision to defer to EPA’s TMDL regulations, Judge Berzon essentially conducted one statutory analysis in place of the *Chevron*

¹⁴⁵ *Id.*

¹⁴⁶ 40 C.F.R. § 130.2(i) (2003).

¹⁴⁷ *Pronsolino*, 291 F.3d at 1132.

¹⁴⁸ 40 C.F.R. § 130.7(b)(1)(iii) (2003).

¹⁴⁹ 33 U.S.C. §§ 1288, 1329 (2000).

¹⁵⁰ *Pronsolino*, 291 F.3d at 1131. In the alternative, the court suggested that it owed deference to EPA’s interpretation of its own regulation, under *Auer v. Robbins*, 519 U.S. 452 (1997), in which the Supreme Court held that an agency’s interpretation of its own regulation is “controlling unless plainly erroneous.” The court pointed to two EPA documents that demonstrated the agency’s understanding of section 303(d). *Id.* at 1133. First, the court highlighted one internal memorandum, sent by EPA’s Assessment and Watershed Protection Division Director to Water Quality Branch Chiefs and TMDL Coordinators in 1992, which clarified that section 303(d) applied to waters polluted solely by nonpoint sources. *Id.* Second, the court pointed to an EPA guidance document, developed in 1997, which stated that EPA’s understanding that section 303(d) applied to nonpoint source polluted waters was “[c]onsistent with long-standing EPA policy, regulations, and practice” *Id.*

¹⁵¹ *Id.* at 1134–35.

¹⁵² *Id.* at 1133.

¹⁵³ *Id.* at 1134.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

two-step, concluding that, based on the text and structure of the CWA, EPA's interpretation was "considerably more convincing" than the Pronsolinos.¹⁵⁶ Judge Berzon wholly ignored step one of *Chevron*, whether section 303(d) was ambiguous, instead using statutory construction to demonstrate EPA's reasonable interpretation at the second step of *Chevron*.¹⁵⁷ Adopting a functional reading of section 303(d), Judge Berzon interpreted the term "stringent" in section 303(d) in light of the section's goal to attain water quality standards.¹⁵⁸ Under the Pronsolinos' understanding of section 303(d), this goal would be entirely frustrated.¹⁵⁹ Judge Berzon felt that EPA's interpretation gave effect to congressional intent that EPA focus on effluent limitations on point source discharges before implementing water quality standards.¹⁶⁰

Moreover, Judge Berzon entirely dismissed the Pronsolinos' contention that the structure of the CWA established a general division throughout the statute between point and nonpoint source pollution,¹⁶¹ noting that water quality standards are based on a state's designated use for a water body, not source of pollution.¹⁶² The court further reasoned that sections 319 and 208, which deal separately with nonpoint source pollution controls, did not preclude application of TMDLs for nonpoint source polluted waters because the statute is "replete" with listing and planning requirements.¹⁶³ Unlike sections 208 and 319, Judge Berzon explained, TMDLs are driven by water quality standards.¹⁶⁴

The crux of the court's structural interpretation, however, focused on the Pronsolinos' suggested scheme, which the court deemed "irrational."¹⁶⁵ Judge Berzon had little difficulty in concluding that for mixed waters—with both point and nonpoint source discharges—states must calculate TMDLs taking into account nonpoint source pollution because the "effluent limitation" trigger in section 303(d) is satisfied.¹⁶⁶ From here, she opined that Congress could not possibly intend to distinguish between mixed waters and waters polluted solely by nonpoint source pollution because it would

¹⁵⁶ *Id.* at 1139.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1135–36.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1136.

¹⁶¹ *Id.* at 1137.

¹⁶² *Id.* (citing 33 U.S.C. § 1313(a)–(c)). The court further considered the title of section 303, "Water Quality Standards and Implementation Plans," to support EPA's interpretation because section 303(d) was not located in a neighboring section entitled "Water Quality Related Effluent Limitations." *Id.* at 1138 (citing *Porter v. Nussle*, 534 U.S. 516 (2002) (holding that the title of a section and the heading of the statute may be used to resolve doubt about a statute's meaning)).

¹⁶³ *Id.* at 1138.

¹⁶⁴ *Id.* at 1138–39 (noting that section 303(e) requires elimination of nonpoint source pollution to the extent necessary to comply with water quality standards).

¹⁶⁵ *Id.* at 1139. Further, under the Pronsolinos' interpretation, states would have to set and monitor water quality standards for all navigable waters, but only identify as impaired those waters with point source discharges that do not improve after application of effluent limitations. *Id.* at 1136.

¹⁶⁶ *Id.* at 1139.

unreasonably force states to monitor waters continuously for added or removed point sources.¹⁶⁷

The court finally dismissed the Pronsolinos' argument that TMDLs for nonpoint source polluted waters raised federalism issues under *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*.¹⁶⁸ In *SWANCC*, the Supreme Court ruled that the Army Corps of Engineers impermissibly extended the definition of "navigable waters" to include intrastate waters that birds used as migratory habitat.¹⁶⁹ The Court declined to afford the agency *Chevron* deference, maintaining that where an agency's interpretation of a statute raises "serious constitutional problems"—in this case, by pushing the limits of the Commerce Clause—courts should construe the statute to avoid constitutional problems.¹⁷⁰ By analogy, the Pronsolinos argued that setting TMDLs for nonpoint sources intruded into areas of traditional state control, and the court should therefore not apply *Chevron* and instead construe section 303(d) narrowly to avoid any constitutional questions.¹⁷¹ The Ninth Circuit rejected the Pronsolinos' argument because it would apply equally to "mixed waters" and the court ruled that Congress clearly intended TMDLs to consider nonpoint source pollution in mixed waters.¹⁷² Deeming TMDLs an "informational" tool, the court found federalism concerns undisturbed because Congress left implementation of TMDLs to state control.¹⁷³

In sum, although Judge Berzon carefully considered section 303(d) and the CWA as a whole, her decision missed the mark by failing to address step one of *Chevron*: whether section 303(d) unambiguously requires TMDLs for nonpoint source polluted waters. As the following section demonstrates, considering the statutory analysis in step one of *Chevron* would likely reveal Congress's clear intent that states and EPA develop nonpoint source TMDLs, firmly establishing EPA's duties under the CWA, and obviating the need to defer to EPA's reasonable interpretation.

IV. HOW THE NINTH CIRCUIT MISAPPLIED *CHEVRON*

Both courts agreed that the Pronsolinos' interpretation of section 303(d) was unpersuasive, if not contrary to the CWA. However, despite the Ninth Circuit's thorough statutory analysis and its assertion that *Chevron* deference was appropriate,¹⁷⁴ the appellate court, unlike the district court,

¹⁶⁷ *Id.*

¹⁶⁸ 531 U.S. 159, 172–73 (2001).

¹⁶⁹ *Id.* at 172.

¹⁷⁰ *Id.*

¹⁷¹ *Pronsolino*, 291 F.3d at 1140.

¹⁷² *Id.*

¹⁷³ *Id.* The court unequivocally stated, "there is no . . . statutory provision . . . requiring implementation of § 303 [implementation] plans or providing for their enforcement." *Id.* The court noted that EPA retains the authority to withhold federal grant money as a method to encourage state implementation of TMDLs, but that states retained the ultimate authority to choose "if and how" to do so. *Id.* (emphasis in original).

¹⁷⁴ See *id.* at 1133 ("In light of the current regulations and the agency's understanding of those regulations, as well as the delegated authority of the EPA to interpret the CWA, the EPA's

failed to apply the *Chevron* two-step with clarity. The Ninth Circuit held that EPA did not exceed its statutory authority when the agency listed the Garcia River as impaired, but failed to explain whether the statute was ambiguous. The court's decision resolved the issue somewhere between steps one and two of *Chevron*. Although Congress probably intended for waters polluted solely by nonpoint sources to be listed under section 303(d), the court only ruled that EPA was *authorized* to list a nonpoint source polluted river.¹⁷⁵ While the distinction may be inconsequential for the Garcia River, an affirmation of the district court's ruling at step one of *Chevron* would provide clear guidance to EPA of its statutory obligation to require TMDLs. Such an affirmation is especially important as EPA currently reconsiders its TMDL regulations.¹⁷⁶ This section explains why Judge Berzon's opinion falls short for not clearly establishing that the CWA unambiguously requires TMDLs for waters polluted solely by nonpoint source pollution.

A. The Chevron Test Applied

The first step of *Chevron* requires a court to evaluate whether congressional intent is clear using "traditional tools of statutory construction."¹⁷⁷ A court may consider the text and structure of the statute, as well as any canons of statutory construction¹⁷⁸ and legislative history to resolve ambiguities if the text of the statute remains unclear.¹⁷⁹ If Congress's intent remains ambiguous, a court must uphold an agency's reasonable interpretation.¹⁸⁰

Despite the Supreme Court's guidance in *Chevron*, neither commentators nor the Supreme Court agree on a single approach to statutory interpretation under *Chevron*.¹⁸¹ Justice Scalia has suggested that

interpretation is entitled to *Chevron* deference.").

¹⁷⁵ *Id.* The Pronsolinos raised three issues in the case: 1) whether section 303(d) required listing of waters polluted solely by nonpoint sources, 2) whether section 303(d) authorized EPA to list nonpoint source polluted rivers as impaired, and 3) whether section 303(d) authorized EPA to set a TMDL for the Garcia River. Opening Brief at 2, *Pronsolino* (Nos. 00-16026 & 00-16027).

¹⁷⁶ See *supra* note 74 and accompanying text.

¹⁷⁷ *Chevron*, 467 U.S. 837, 843 n.9 (1984); see also *I.N.S. v. Cardoza-Fonseca (I.N.S.)*, 480 U.S. 421, 447 (1987) (employing "traditional tools of statutory construction" to determine whether to determine whether the statute was ambiguous at step one of *Chevron* analysis).

¹⁷⁸ See, e.g., *SWANCC*, 531 U.S. 159, 172-73 (2001) (where the Court applied the constitutionality canon when interpreting the CWA, narrowly construing the term "navigable waters" to avoid impermissibly extending Corps' authority beyond the scope of the Commerce Clause); see also *I.N.S.*, 480 U.S. at 449 (where the Court based its decision on the plain language of the Immigration and Nationality Act, but noted that it could use the canon of construction in which courts construe ambiguities in deportation cases in favor of the alien).

¹⁷⁹ WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* 152 (2d ed. 2001) (citing Michael Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 ADMIN. L. NEWS 1 (1991)).

¹⁸⁰ *Id.*

¹⁸¹ See Jonathan T. Molot, *Reexamining Marbury In The Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1312-13 (2002) (noting that despite differing jurisprudential approaches, judges tend to

there are two situations in which a statute is ambiguous: when there are two equally valid interpretations of a statute and when there are two reasonable (but not equally valid) interpretations of a statute.¹⁸² Applied to this case, unless the competing interpretations of section 303(d) are in perfect equipoise, the reasonableness of the Pronsolinos' interpretation is a workable litmus test for the clarity of section 303(d). In other words, if the Pronsolinos cannot provide a plausible framework for the TMDL provision excluding nonpoint source polluted waters (in light of "traditional tools of statutory construction"),¹⁸³ then Congress likely expressed a clear intent in section 303(d) that states develop TMDLs for impaired waters regardless of the source of pollution, and there is no reason to proceed to the reasonableness step of *Chevron's* two-part test.¹⁸⁴

B. Does Chevron Even Apply to EPA's TMDL Regulations?

Both the district and appellate courts properly considered the validity of EPA's interpretation of section 303(d) through the *Chevron* framework because Congress delegated to EPA the authority to promulgate rules carrying the force of law¹⁸⁵ and the agency's understanding of section 303(d) was, in fact, embodied in notice and comment regulations. Under the Supreme Court's decision in *Mead*, courts afford substantial deference under *Chevron* to agency interpretations promulgated pursuant to congressionally-delegated rulemaking authority.¹⁸⁶

First, the Clean Water Act authorizes the EPA Administrator to "prescribe such regulations as are necessary to carry out his functions under [the CWA]."¹⁸⁷ Furthermore, EPA's TMDL regulations clearly call for listing and TMDLs for waters polluted solely by nonpoint sources, directing states to identify as impaired those waters for which "best management practices"

agree on the importance of consistent statutory interpretations); see also *Anatomy of Chevron*, *supra* note 97, at 1260-62 (noting that the Supreme Court has not given clear guidance on what the reasonableness evaluation at step two of *Chevron* should entail).

¹⁸² Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (1989) (outlining the author's understanding of "plain meaning," which focuses on the language and structure of the statute, excluding legislative history).

¹⁸³ *Chevron*, 467 U.S. 837, 843 n.9 (1984).

¹⁸⁴ Both the district court and the Ninth Circuit considered the *Chevron* question in terms of the reasonableness of the Pronsolinos' interpretation of section 303(d). Although the district court determined at the first step of *Chevron* that section 303(d) must clearly require TMDLs for nonpoint source polluted waters because the Pronsolinos' interpretation would violate the "comprehensive" nature of the CWA, the Ninth Circuit used the "irrational" result of the Pronsolinos' interpretation, at the second step of *Chevron*, as evidence of the reasonableness of EPA's construction. Compare *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1347 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003), with *Pronsolino*, 291 F.3d 1123, 1139 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

¹⁸⁵ *Mead*, 533 U.S. 218, 229 (2001).

¹⁸⁶ *Id.* (recognizing "a very good indicator of delegation meriting *Chevron* treatment is express congressional authorization to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed").

¹⁸⁷ 33 U.S.C. § 1361(a) (2000).

are not “stringent enough” to achieve applicable water quality standards.¹⁸⁸ Because “best management practices” apply only to nonpoint source pollution control, the regulation plainly contemplates that nonpoint source polluted waters must be listed. Moreover, the agency defines a “water quality limited segment” (one requiring a TMDL) to mean any portion of a water body failing to meet water quality standards *or* any portion failing to meet water quality standards after the application of effluent limitations,¹⁸⁹ showing that the source of pollution is irrelevant when states decide whether to list an impaired water segment. EPA regulations, at least, unambiguously require states to develop TMDLs for nonpoint source polluted waters. Thus, without question, if EPA is owed any deference at all, then the proper standard should be *Chevron*.

C. The CWA Unambiguously Requires a TMDL for the Garcia River

Under Justice Scalia’s test for ambiguity at the first step of *Chevron*, the CWA clearly requires that nonpoint source polluted waters be listed as impaired because the Pronsolinos’ interpretation of section 303(d) is not only inferior to EPA’s, but entirely unreasonable. Section 303(d) requires that states list as impaired those waters for which effluent limitations “are not stringent enough” to implement water quality standards.¹⁹⁰ The Pronsolinos’ most promising explanation turns on the specific language in section 303(d), which directs states to list as impaired those waters for which “effluent limitations” are not “*stringent enough* to implement any applicable water quality standards.”¹⁹¹ Concededly, the natural meaning of the words “are not stringent enough” suggests that if effluent limitations *were* stringent enough, water quality standards might be achieved. This is simply not the case in waters polluted solely by nonpoint source pollution—no matter how stringent effluent limitations might possibly be, these waters will never achieve water quality standards.

Such a hypertechnical reading of section 303(d) fails, however, in light of the structure and purpose of the CWA. For example, the water quality

¹⁸⁸ 40 C.F.R. § 130.7 (2002). The regulations require identification as water quality limited those segments for which “(i) [t]echnology-based effluent limitations . . . (ii) [m]ore stringent effluent limitations . . . and (iii)[o]ther pollution control requirements [e.g., best management practices] required by local, state, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.” *Id.*

¹⁸⁹ *Id.* The regulations define “water quality limited segment” to mean “[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.” *Id.* § 130.2(j). The Ninth Circuit duly noted that this definition of a water quality limited segment dates back to 1973. *Pronsolino*, 291 F.3d at 1133; see also 40 C.F.R. § 130.11(d)(1) (1973). Even standing alone, this definition is sufficient to establish that EPA’s regulations require a TMDL for the Garcia River because the definition clearly contemplates that any water failing to meet water quality standards, regardless of source of pollution, should be listed under section 303(d). *Id.*

¹⁹⁰ 33 U.S.C. § 1313(d)(1)(A) (2000).

¹⁹¹ *Id.* (emphasis added).

based portion of the statute, unlike the NPDES permit program, does not distinguish between sources of pollution. Congress placed the TMDL provision in section 303, which deals with water quality standard setting for *all* navigable waters.¹⁹² Fundamentally, the water quality program is ambient based, grounded on state defined designated uses, not technology-based limitations on individual sources.¹⁹³ The purpose of listing under section 303(d) is to identify *waters* failing to meet water quality standards.¹⁹⁴ As the Ninth Circuit noted, section 303(d)'s language simply reflected Congress's intent to focus first on the technology-based program, and then establish water quality standards applicable to both point and nonpoint sources.¹⁹⁵ The Pronsolinos' technical interpretation, therefore, could only make sense if read without consideration of the CWA and the purposes for which it was enacted.

Numerous structural problems further discredit the Pronsolinos' interpretation of section 303(d). The fact that other sections of the CWA also address nonpoint source pollution is entirely inconsequential. Section 208, a voluntary program offering funding to encourage state "areawide waste treatment management plans," targets "urban-industrial" areas with "substantial water quality problems" to develop necessary municipal and industrial waste treatment processes.¹⁹⁶ The fact that Congress thought to encourage local planning for nonpoint source pollution on an area wide basis, in addition to the TMDL requirement for individual waterbody *segments*, hardly means that Congress intended the TMDL provision to apply solely to point source pollution. Similarly, section 319 is a grant program that encourages states to employ "best management practices" and develop programs for nonpoint source pollution control.¹⁹⁷ Neither provision is tied to water quality standards, the driving force behind TMDLs; both are simply congressional attempts to encourage state planning for nonpoint source pollution by promising financial incentives. The numerous programs for state nonpoint source pollution control programs makes sense because Congress explicitly decided not to regulate nonpoint sources directly, unlike

¹⁹² *Id.* § 1313.

¹⁹³ *Id.*

¹⁹⁴ *Id.* § 1313(d)(1)(A).

¹⁹⁵ *Pronsolino*, 291 F.3d 1123, 1136 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003). Judge Berzon exhaustively documented the structural arguments discrediting the Pronsolinos' interpretation of section 303(d). Specifically, Judge Berzon noted the fact that other sections of the CWA deal specifically with water quality related effluent limitations so Congress likely would have put the TMDL provision in either of these categories if their use was limited to point sources. *Id.* at 1137–38 (citing 33 U.S.C. § 1312) (2000). She also suggested that although sections 208 and 319 specifically address nonpoint source pollution, neither of these sections are tied to water quality standards—the driving force behind TMDLs—refuting the Pronsolinos' argument that Congress intended for nonpoint source pollution controls to be dealt with through alternate statutory provisions. *Id.* at 1138–39. Judge Berzon's recognition of the numerous structural difficulties with the Pronsolinos' interpretation of section 303(d), and the overwhelming support for EPA's interpretation, makes her failure to conclude at step one of *Chevron* all the more perplexing.

¹⁹⁶ *Id.*

¹⁹⁷ 33 U.S.C. § 1329 (2000).

the NPDES permitting system for point sources. Absent this command-and-control approach, Congress has had to seek new and creative ways to encourage states to control nonpoint source pollution adequately without treading on state autonomy, because, even assuming nonpoint source TMDLs are valid, states are vitally important to ensure that TMDLs are meaningfully implemented and enforced.

Moreover, there is no support, either in the statute or in its legislative history,¹⁹⁸ for the Pronsolinos' contention that because Congress intended to regulate point sources directly, through federally established technology-based effluent limitations, nonpoint sources should be exempt from the water quality based portion of the program.¹⁹⁹ Requiring that states and EPA list as impaired, and develop TMDLs for, nonpoint source polluted waters does not constitute direct federal regulation. Unlike the NPDES permit program, which is based on federally mandated technology-based limitations, states set water quality standards that ultimately determine whether waterbodies are deemed impaired.²⁰⁰ Neither EPA nor citizens have authority under the CWA to seek federal enforcement of TMDL load allocations because load allocations are not incorporated into federal permits. As the Ninth Circuit confirmed, the only stick available to EPA should states fail to adequately implement or enforce TMDLs against nonpoint sources is the threat of reduced funding for state programs.²⁰¹ Thus, inclusion of nonpoint source polluted waters does not threaten state regulatory authority.

Most telling, however, is that both the district court and the Ninth Circuit noted the untenable result of the Pronsolinos' interpretation of section 303(d). The district court determined that excluding nonpoint source polluted waters would create a "chasm" in the CWA's "comprehensive" scheme of pollution control.²⁰² The Ninth Circuit termed the Pronsolinos'

¹⁹⁸ The Pronsolinos relied primarily on an excerpt from the House Report, which stated:

Water quality standards will be utilized for the purpose of setting effluent limitations in those cases where effluent limitations for point sources would not be consistent with such standards. Even though all point sources must by January 1, 1976, at a minimum, meet the requirements of subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 all point sources could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent limitations set pursuant to subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards. In this case, a more stringent effluent limitation will be imposed.

H.R. Rep. No. 92-911 (1972). As both the district court and the Ninth Circuit noted, this passage at most establishes that TMDLs should be used to set more stringent effluent limitations for point sources to achieve compliance with water quality standards. Further, "more stringent effluent limitation" does not refer exclusively to TMDLs; states and EPA may use several methods to restrict point source discharges, including narrative conditions, pollution modeling, and TMDLs.

¹⁹⁹ *Pronsolino*, 291 F.3d at 1135-36.

²⁰⁰ See 33 U.S.C. § 1313(a)(3)(A) (2000) (directing states to establish water quality standards by October 18, 1972).

²⁰¹ *Pronsolino*, 291 F.3d at 1140.

²⁰² *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1347 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

construction an “irrational regime” because it would create an arbitrary distinction between waters with both point and nonpoint source dischargers—clearly covered by section 303(d)—and waters with only point source dischargers.²⁰³ Indeed, by the Ninth Circuit’s own statutory analysis, the *Pronsolinos* neither offered a reasonable interpretation of section 303(d),²⁰⁴ nor one as valid as EPA’s,²⁰⁵ leaving little room for ambiguity in the statute. As a result, the district court, and not the Ninth Circuit, correctly ruled under *Chevron* that section 303(d) unambiguously required TMDLs for nonpoint source polluted waters.

A possible explanation for Judge Berzon’s reluctance to rule at step one of *Chevron* is that she sought to distinguish between deciding EPA’s *discretionary* duties under section 303(d) and its *mandatory* duties, an issue which would not presumably be directly before the court until citizens sue EPA to force the agency to set a nonpoint source TMDL. The court broached a similar issue in *Dioxin/Organochlorine Center v. Clark (Dioxin)*, in which plaintiffs challenged EPA’s authority to set a TMDL for dioxin, a toxic pollutant, despite the fact that the technology referenced in section 303(d) does not apply to toxic pollutants.²⁰⁶ The court ruled that the CWA authorized EPA to set a TMDL for dioxin as a matter of law, but specifically left unanswered whether the statute *required* EPA to set TMDLs for waters polluted by dioxin.²⁰⁷ The court believed this was in keeping with the Supreme Court’s guidance in *Arkansas v. Oklahoma*.²⁰⁸ In *Arkansas*, the Supreme Court emphasized that it was unnecessary to determine EPA’s statutory obligations under the CWA in order to determine whether the statute authorized EPA to implement conditions on a NPDES permit requiring compliance with state water quality standards.²⁰⁹

The Ninth Circuit’s reliance on *Arkansas* in *Dioxin* was misplaced, however, and does not justify its reasoning in *Pronsolino*. *Arkansas* involved Congress’s explicit statutory grant of discretion to the Administrator to include conditions on NPDES permits. The relevant text of section 402(a)(2) of the CWA provides that “[t]he Administrator shall prescribe conditions . . . to assure compliance with the requirements of [§ 402(a)(1)] . . . and such other requirements as he deems appropriate.”²¹⁰ The central issue in *Arkansas* was whether EPA reasonably exercised the discretion granted to it by section 402(a)(2) when it required that Arkansas comply with Oklahoma’s water quality standards.²¹¹ Thus, it was entirely logical for the Court to

²⁰³ *Pronsolino*, 291 F.3d at 1139.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Dioxin*, 57 F.3d 1517, 1523–28 (9th Cir. 1995).

²⁰⁷ *Id.* at 1528.

²⁰⁸ 503 U.S. 91, 105–07 (1992) (holding that the CWA authorized EPA to implement conditions on a NPDES permit allowing an Arkansas sewage treatment plan to discharge effluent into the Illinois River when the discharge would not cause a detectable violation of Oklahoma water quality standards).

²⁰⁹ *Id.* at 105–06.

²¹⁰ 33 U.S.C. § 1342(a)(2) (2000).

²¹¹ *Arkansas*, 503 U.S. at 105–07.

decline to address whether the statute required compliance with a downstream state's water quality standards. In *Dioxin*, however, the important inquiry was whether the agency's interpretation of section 303(d), which required states and EPA to develop TMDLs for waters polluted by dioxin, was in keeping with Congress's clear intent in section 303(d), or, alternatively, was a reasonable interpretation of an ambiguous statutory provision. As in *Dioxin*, the critical issue in *Pronsolino* concerned whether section 303(d) in fact required states to develop TMDLs for nonpoint source polluted waters, and if not, whether EPA's interpretation of the provision was a reasonable one. Indeed, the Supreme Court's guidance in *Chevron* is clear—a reviewing court *must* first decide whether Congress unambiguously expressed its intent in the relevant statute, because if so, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²¹² Because Congress clearly expressed its intent in section 303(d) that states list and develop TMDLs for nonpoint source polluted waters, the Ninth Circuit's analysis should have gone no further than deciding that section 303(d) unambiguously required TMDLs for nonpoint source pollution.

V. IMPLICATIONS

Despite the court's failure to rule at step one of *Chevron*, the Ninth Circuit's decision is important for clean water for precisely the reason that nonpoint source polluters fear: It establishes a federal “hook” to force private landowners to comply with water quality standards. To the extent that land-based activities affect water quality, the CWA's reach now extends, in some respect, to private use of land. At least in theory, the “costs” of water pollution, in terms of declining fish runs, inadequate drinking water, or a fisherman's lost livelihood, are now more likely to be borne by the individuals responsible for the pollution and profiting from the unregulated use of land. If nothing else, the decision serves a symbolic purpose, confirming that the CWA can hold all sources of pollution accountable.

Practically speaking, *Pronsolino* implicates the vast majority of polluted waters in the Western states²¹³ because it not only established EPA's authority to list and develop TMDLs for nonpoint source polluted waters, but it confirmed the states' mandatory duty to list as impaired “blended waters.”²¹⁴ Perhaps the best way to view the import of the court's decision is in terms of what might have been lost had the *Pronsolinos* prevailed: In California only one percent of waters are polluted solely by point sources.²¹⁵ The *Pronsolino* case demonstrates a best-case scenario as well: Once EPA established the Garcia River TMDL, the California Department of Forestry, a state agency, implemented the TMDL through conditions on state land-use

²¹² *Chevron*, 467 U.S. 837, 842–43 (1984).

²¹³ See discussion *supra* Part II.A.

²¹⁴ *Pronsolino*, 291 F.3d 1123, 1139 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

²¹⁵ *Ninth Circuit Rules that EPA May Require TMDLs for Nonpoint Source Pollution*, CALIFORNIA ENVIRONMENTAL INSIDER, Volume 16, Number 1 (June 14, 2002).

permits.²¹⁶ In worst-case scenarios, EPA may encourage reluctant states to implement and enforce nonpoint source TMDLs by threatening to limit or withdraw program funding.²¹⁷ Improvements in water quality may be achieved yet without disturbing the balance of authority between states and the federal government.

Nonetheless, Judge Berzon's ruling at step two of *Chevron* left unanswered the critical question of whether states and EPA have a mandatory duty to list as impaired, and develop TMDLs for, nonpoint source polluted waters. This section discusses the practical legal implications of *Pronsolino*: first, discussing whether environmental plaintiffs may use the decision to force EPA to set TMDLs for nonpoint source polluted waters; and second, considering whether, if EPA withdrew nonpoint source polluted waters from the TMDL requirement in new regulations, the regulations could withstand judicial scrutiny.

A. Can Citizens Force EPA to Set TMDLs for Nonpoint Source Polluted Waters?

Under current regulations, environmental plaintiffs should be able to capitalize on the Ninth Circuit's decision to force EPA to set TMDLs for nonpoint source polluted waters. Much like litigation during the 1990s that established EPA's mandatory duty to develop TMDLs in lieu of adequate state action under the "constructive submission" theory,²¹⁸ environmental plaintiffs should be able to force the EPA to develop nonpoint source TMDLs if states fail to do so in a timely manner. In order to be successful, plaintiffs should make two distinct arguments. First, environmental plaintiffs should argue that the CWA unambiguously requires states and the agency to list and develop TMDLs for nonpoint source polluted waters. Second, plaintiffs should argue that EPA regulations clearly require listing and TMDLs for nonpoint source polluted waters. This section will only discuss the merits of the second argument. EPA's mandatory duties under the CWA are addressed in Part IV.C.²¹⁹

In light of the Ninth Circuit's decision, the agency will have a difficult time explaining how its regulations interpreting section 303(d) give the agency discretion to ignore nonpoint source impaired waters, especially given the agency's understanding of section 303(d) consistently expressed in its TMDL regulations.²²⁰ This Chapter established in Part IV.A that EPA regulations clearly require listing and TMDLs for nonpoint source polluted

²¹⁶ *Id.* at 1129–30.

²¹⁷ *Id.* at 1140.

²¹⁸ See *Scott v. Hammond*, 741 F.2d 992, 996–98 (7th Cir. 1984) (holding that a state's failure to comply with its statutory duty to list water quality limited waterbodies amounted to a "constructive submission" to EPA of no list at all, thereby obligating the agency to establish the list).

²¹⁹ Such an argument would be framed as an action to compel agency action unlawfully withheld under 5 U.S.C. § 706(1) (2000).

²²⁰ "EPA initially interpreted [section] 303(d) exactly as it does today." *Pronsolino*, 291 F.3d at 1133–34.

waters,²²¹ and the Ninth Circuit so held.²²² Under *Seminole Rock* an agency's interpretation of its own regulations must be upheld unless "plainly erroneous or inconsistent with the regulation."²²³ EPA cannot meet even this low standard because *any* interpretation not requiring the establishment of TMDLs for nonpoint source polluted waters is plainly "inconsistent with the regulation."²²⁴ Indeed, much like the *Chevron* doctrine, a court should only defer to *ambiguous* agency regulations—which EPA's TMDL regulations are not.²²⁵

Even aside from the clear text of EPA's regulations, EPA would not likely have a plausible argument that the agency has reinterpreted its TMDL regulations. In the first place, EPA would have to set out its new interpretation in an interpretative rule to receive any consideration from a reviewing court. In *Bowen v. Georgetown University Hospital*,²²⁶ the Supreme Court held that an agency's interpretation of its own regulations asserted for the first time during litigation is not entitled to any judicial deference.²²⁷ A new interpretation of EPA's TMDL regulations put forth for the first time during litigation would therefore carry little weight with a reviewing court. More importantly, under *Seminole Rock*, a reviewing court looks to the agency's "consistent" construction of a regulation when deciding whether to defer to the agency's interpretation.²²⁸ *Pronsolino* confirmed EPA's consistent interpretation of its TMDL regulations, expressed in internal memoranda and agency directives, to require listing of nonpoint source polluted waters.²²⁹ A new contradictory interpretation would confuse the agency's long-standing reading of the TMDL regulations, drawing little to no deference from a reviewing court.

²²¹ See *supra* Part IV.A. Specifically, Part IV.A establishes that because EPA regulations direct states to list waters if best management practices, which apply only to nonpoint sources, are not stringent enough to implement water quality standards and because the agency's definition of a water quality limited segment, requiring a TMDL, includes *any* water not achieving water quality, EPA regulations leave no room for doubt that TMDLs must be developed for nonpoint source polluted waters. *Id.*

²²² The court noted that "[t]he first regulations promulgated after the enactment of the CWA in 1972 quite clearly required the identification on [section] 303(d)(1) lists of waters polluted only by nonpoint sources." *Pronsolino*, 291 F.3d 1123, 1133 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

²²³ *Seminole Rock*, 325 U.S. 410, 414 (1945); see also discussion *infra* Part III.B.

²²⁴ See *infra* Part III.B.

²²⁵ See *Christenson v. Harris County*, 529 U.S. 576, 580–82, 586–88 (2000) (declining to defer to a Department of Labor opinion letter interpreting the agency's regulations because the Court found the regulations unambiguous).

²²⁶ 488 U.S. 204 (1988).

²²⁷ *Id.* at 212. But see *Auer v. Robbins*, 519 U.S. 452, 458–59 (1997) (deferring to the Department of Labor's interpretation of its own regulation put forth for the first time in an amicus brief). In *Auer*, the Court reasoned that "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. The difference is likely explained by the fact that in *Auer*, the agency was not involved in the litigation in which its interpretation was being used.

²²⁸ See *Seminole Rock*, 325 U.S. at 417–18 (basing its deference to the agency's interpretation because of the language of the regulation and the agency's "consistent administrative interpretation" of the regulation).

²²⁹ *Pronsolino*, 291 F.3d 1123, 1133 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

In sum, because EPA's TMDL regulations clearly require listing and TMDLs for nonpoint source polluted waters, and because courts should not afford a new EPA interpretation of its TMDL regulations any deference, under current regulations environmental plaintiffs should have no difficulty forcing the agency to list and develop TMDLs for nonpoint source polluted waters.

B. What If EPA Changes Its Mind in Revised TMDL Regulations?

By deferring to EPA's interpretation of the CWA, Judge Berzon unfortunately left unanswered whether section 303(d) requires EPA to set TMDLs for nonpoint source polluted waters, ruling only that EPA's reasonable interpretation of section 303(d) was entitled to deference.²³⁰ A pressing concern is that the Bush Administration may rescind the nonpoint source TMDL requirement in revised TMDL regulations.²³¹ If EPA changes its position in new regulations, environmental plaintiffs will have a potential claim against the agency under the Administrative Procedure Act,²³² which directs courts to set aside agency action that is "arbitrary and capricious . . . or otherwise not in accordance with the law,"²³³ or in "excess of statutory . . . authority."²³⁴ A regulation contradicting the mandate of the CWA is plainly "not in accordance with the law."²³⁵

To establish that a new EPA regulation is "not in accordance with the law," plaintiffs would need to defeat the agency's claim of deference under *Chevron* for its new interpretation of section 303(d). Because Judge Berzon failed to address whether the CWA unambiguously requires TMDLs for nonpoint source polluted waters, plaintiffs would need to establish either that the CWA clearly requires nonpoint source TMDLs—at step one of *Chevron*—or that EPA's new interpretation of section 303(d) is unreasonable—at step two of *Chevron*.²³⁶ Otherwise, an agency's reasonable interpretation of the statute it administers is entitled to a reviewing court's deference,²³⁷ and should be deemed lawful²³⁸

²³⁰ *Id.* at 1131.

²³¹ EPA withdrew the 2000 TMDL regulations and is expected to publish new regulations shortly. See discussion *supra* Part II.B.

²³² Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

²³³ 5 U.S.C. § 706(2)(A) (2000). Alternatively, plaintiffs could challenge the substantive decision to *rescind* nonpoint source TMDLs as "arbitrary and capricious." *Id.* The leading Supreme Court decision is *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), in which the Court explained that an agency rule is arbitrary and capricious if the agency "relie[d] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43. The validity of the TMDL rule under this approach would rest largely on EPA's defense of its position in the rule, and is not addressed in this Chapter.

²³⁴ 5 U.S.C. § 706(2)(C) (2000).

²³⁵ 5 U.S.C. § 706(2)(A) (2000).

²³⁶ 467 U.S. at 842-43.

²³⁷ *Id.*

If the opportunity presents itself, courts should interpret section 303(d) to unambiguously require nonpoint source TMDLs. Indeed, Judge Berzon recognized that the statute was “best read” to trigger listing and TMDLs for nonpoint source polluted waters,²³⁹ and overwhelmingly preferred EPA’s interpretation of section 303(d) over the Pronsolinos’ interpretation.²⁴⁰ Moreover, as this Chapter and the Ninth Circuit agree on, the Pronsolinos’ construction of the CWA makes little sense because the statute clearly requires TMDLs for nonpoint source pollution in mixed waters. Excluding only waters polluted solely by nonpoint source pollution would create an arbitrary distinction.²⁴¹ Absent a persuasive argument that section 303(d) is ambiguous, a new TMDL regulation should fail for want of ambiguity at step one of *Chevron*.

At the very least, however, the Ninth Circuit’s characterization of the Pronsolinos’ interpretation of section 303(d) as “irrational” suggests that courts should find a new EPA regulation excluding nonpoint source pollution to be an impermissible interpretation of the statute at the second step of *Chevron*. An EPA reading of section 303(d) excluding nonpoint source polluted waters from the listing and TMDL requirement—although possible in the most technical sense, and, of course, politically advantageous for timber and agricultural interests—simply makes no sense in light of the structure and purpose of the CWA.²⁴² Moreover, because EPA has consistently interpreted section 303(d) to apply to nonpoint source pollution, a sudden departure from its long-standing policy²⁴³ should be afforded little deferential weight.²⁴⁴ Accordingly, if EPA sought to withdraw nonpoint source polluted waters from the TMDL requirement, reviewing courts would likely invalidate the regulations as an impermissible interpretation of the CWA.

VI. OBSTACLES TO EFFECTIVE TMDLS FOR NONPOINT SOURCE POLLUTED WATERS

Although the Ninth Circuit’s decision implicates the leading source of water pollution in western states (and the nation), TMDLs for nonpoint

²³⁸ 5 U.S.C. § 706(2)(A) (2000).

²³⁹ *Pronsolino*, 291 F.3d 1123, 1140 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

²⁴⁰ “Looking at the statute as a whole, we conclude that EPA’s interpretation of § 303(d) is not only entirely reasonable but considerably more convincing than the one offered by the plaintiffs in this case.” *Id.* at 1139 n.17.

²⁴¹ See discussion *supra* Part IV.C.

²⁴² The goal of the CWA, of course, is to “restore and maintain the chemical, physical, and biological integrity of the Nations waters.” 33 U.S.C. § 1251(a) (2000).

²⁴³ *Pronsolino*, 291 F.3d at 1133.

²⁴⁴ *I.N.S.*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); see also Brief for Federal Appellees, *supra* note 122, at 31 (arguing that “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 Section 301(b)(1)(A) and 301(b)(1)(B) are insufficient to bring such waters into attainment with their WQS”).

source polluted waters are only one piece of the puzzle; a large portion of responsibility for reduction of nonpoint source pollution (namely, implementation and enforcement) currently remains with the states.

The Ninth Circuit established in *Pronsolino* that under current regulations EPA does not have the authority to implement TMDLs.²⁴⁵ Section 303(e) of the CWA merely directs states to include in their continuing planning-processes "plans" that include any relevant TMDLs.²⁴⁶ The result is two-fold: EPA may not develop implementation plans should a state fail to implement a TMDL,²⁴⁷ and citizens have no ability to force the states (via EPA) to implement nonpoint source TMDLs. In states refusing to address water pollution the result can be extreme. For instance, in Georgia, after years of litigation aimed at forcing the state to develop TMDLs,²⁴⁸ and after EPA finally developed TMDLs for the state's impaired waters,²⁴⁹ Georgia failed to implement any of the EPA-developed TMDLs.²⁵⁰ The Eleventh Circuit refused to find that, under current regulations, a TMDL includes an implementation plan, leaving implementation of the TMDLs wholly to Georgia's discretion, for good or ill.²⁵¹

Unlike NPDES permits for point source dischargers (which incorporate TMDL load allocations and therefore make TMDL load allocations federally enforceable by EPA and citizens),²⁵² nonpoint source TMDLs lack any federal enforcement mechanism or citizen suit provision. EPA simply does not have the statutory authority to regulate nonpoint source land-based activities. The fact that citizen suits have predominantly forced development

²⁴⁵ See *supra* note 173 (pointing out that the Ninth Circuit stated in *Pronsolino* that states retain sole authority to implement TMDLs). Noting that EPA's pending TMDL regulations (no longer in effect) included implementation plans as part of a TMDL, the Ninth Circuit refused to comment on the validity of the TMDL regulations. *Pronsolino*, 291 F.3d at 1140. Similarly, the Eleventh Circuit held that implementation plans are not included in the definition of a TMDL, thereby rejecting Sierra Club's claim that EPA must develop an implementation plan for impaired Georgia waters pursuant to a consent decree in which EPA agreed to develop TMDLs for impaired waters. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002).

²⁴⁶ 33 U.S.C. § 1313(e) (2000).

²⁴⁷ Whether EPA may assert the authority to develop implementation plans in revised TMDL regulations is still unclear, an issue the *Pronsolino* court declined to address. *Pronsolino*, 291 F.3d at 1140. EPA clearly thought so, however, when it drafted its July 2000 regulations, which included an implementation plan as part of a TMDL. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,668 (July 13, 2000). Although it is uncertain what EPA will do with its revised TMDL regulations, including federal authority to develop implementation plans may help to improve the effectiveness of nonpoint source TMDLs.

²⁴⁸ See *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996) (ruling that EPA was required to develop TMDLs for Georgia's impaired waters because the state had only developed two TMDLs and had no plans to develop additional TMDLs for the other waters listed under section 303(d)).

²⁴⁹ *Sierra Club v. Meiburg*, 296 F.3d at 1027-28.

²⁵⁰ *Id.* Once Sierra Club brought suit to force EPA to develop an implementation plan for the state's TMDLs, Georgia finally developed an implementation plan. *Id.*

²⁵¹ *Id.*

²⁵² 33 U.S.C. § 1342.

of the TMDL program underscores this weakness.²⁵³ To make TMDLs for nonpoint sources meaningful, therefore, state implementation and enforcement of TMDL provisions are crucial.

EPA is not totally powerless to influence states to implement and enforce nonpoint source TMDLs, because, as mentioned earlier, EPA may threaten to limit program funds to persuade resistant states.²⁵⁴ In addition, EPA can encourage states further by delegating a portion of section 319 grants for nonpoint source management programs to implement and enforcement of TMDLs.²⁵⁵ While certainly not as powerful a tool as direct federal enforcement authority or citizen suits, the results in states like California (where the Garcia River TMDL was incorporated into state land-use permitting) suggest that a forceful federal hand may not be necessary in every state to achieve cleaner water through the TMDL program. Nevertheless, worst-case scenarios in states that consistently refuse to meet their duties under the CWA demonstrate that an increased federal role may be the only way to truly reduce the nation's leading cause of water pollution.

VII. CONCLUSION

The Ninth Circuit's decision in *Pronsolino* is not the wholesale solution to nonpoint source pollution in the West; the TMDL program is a long-term collaborative process between the states and EPA with numerous problems yet to be resolved. Nonetheless, the decision protects the status quo in states, such as Oregon, which already set TMDLs for nonpoint source polluted waters²⁵⁶ and ensures that—at least when EPA takes the initiative—nonpoint source polluted waters will benefit from TMDLs. Moreover, the decision suggests that citizen groups will have a strong case against EPA to establish the agency's mandatory duty to set TMDLs for nonpoint source polluted waters.

TMDL implementation and enforcement, however, should be the next area of EPA and congressional attention. Administratively, EPA's long-awaited TMDL regulations will have a measurable impact on TMDLs for nonpoint sources. As the agency proposed in its 2000 version of the TMDL regulations, EPA should assert its authority to develop implementation plans for states failing to meet their statutory obligations, a provision which would benefit all TMDLs and not just those for nonpoint source polluted waters. Further, despite Congress's reluctance to interfere with state control over land-based activities, federal responsibility for nonpoint source pollution in Western states is significant. Indeed, the federal government manages sixty percent of watersheds in the West, and in Oregon and Arizona nonpoint source pollution from federal activities causes at least half of all water

²⁵³ See *supra* discussion Part II.B.

²⁵⁴ *Pronsolino*, 291 F.3d 1123, 1128–29 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (2003).

²⁵⁵ EPA FY 2003 § 319 Guidance, *supra* note 75.

²⁵⁶ See OR. DEP'T OF ENVTL. QUALITY, NONPOINT SOURCE TMDL GUIDANCE DOCUMENT, at <http://www.deq.state.or.us/wq/nonpoint/nonpointTMDL.htm> (last visited July 19, 2003).

quality problems.²⁵⁷ Consequently, it is no less apparent today than in 1987—when Congress first recognized nonpoint source pollution abatement as a national policy—that nonpoint source pollution is a *national* problem. Now, however, it is clear that voluntary programs such as section 319 have produced little in the way of improvements. With attention from Congress and EPA, the TMDL program may yet provide the necessary solution.

²⁵⁷ GAO REPORT, *supra* note 2, at 75-76.