

No. 00-16026

No. 00-16027

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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**GUIDO A. PRONSOLINO and BETTY J. PRONSOLINO, as Trustees for the Guido A. Pronsolino and Betty J. Pronsolino Trust; the MENDOCINO COUNTY FARM BUREAU; the CALIFORNIA FARM BUREAU FEDERATION; and the AMERICAN FARM BUREAU FEDERATION,**

**Appellants,**

**v.**

**FELICIA MARCUS, Regional Administrator, United States Environmental Protection Agency Region IX; CAROL M. BROWNER, Administrator, United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**

**Appellees.**

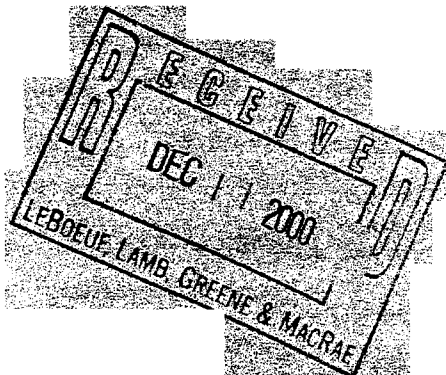
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**Appeal from the United States District Court for the Northern District of California  
(No. C 99-01828-WHA)  
Honorable William Alsup, Judge**

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**AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, OREGON,  
WASHINGTON, DELAWARE, MAINE, MARYLAND, AND NEW JERSEY IN  
SUPPORT OF APPELLEES**

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**BILL LOCKYER, Attorney General of the  
State of California  
RICHARD M. FRANK  
Chief Assistant Attorney General  
MARY E. HACKENBRACHT  
Senior Assistant Attorney General  
MARC N. MELNICK, SBN 168187  
Deputy Attorney General  
1515 Clay Street, 20th Floor  
Oakland, California 94612  
Telephone: (510) 622-2133**

**[Additional Counsel Listed on First Inside Page]**

HARDY MYERS  
Attorney General of the State of Oregon  
1162 Court Street, N.E.  
Salem, Oregon 97310

CHRISTINE O. GREGOIRE  
Attorney General of the State of Washington  
1125 Washington Street  
P.O. Box 40100  
Olympia, Washington 98504-0100

M. JANE BRADY  
Attorney General of the State of Delaware  
820 N. French Street  
Wilmington, Delaware 19801

ANDREW KETTERER  
Attorney General of the State of Maine  
6 State House Station  
Augusta, Maine 04333-0006

J. JOSEPH CURRAN, JR.  
Attorney General of the State of Maryland  
200 St. Paul Place  
Baltimore, Maryland 21202

JOHN J. FARMER, JR.  
Attorney General of the State of New Jersey  
Justice Complex  
P.O. Box 080  
Trenton, New Jersey 08625

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	2
STATEMENT OF FACTS	3
ARGUMENT	9
I. THE PLAIN LANGUAGE OF THE CLEAN WATER ACT SUPPORTS THE INCLUSION OF NON-POINT SOURCE POLLUTION IN THE DEVELOPMENT OF TMDLS.	10
II. RULES OF STATUTORY INTERPRETATION SUPPORT THE INCLUSION OF ALL NON-POINT SOURCE POLLUTION IN THE DEVELOPMENT OF TMDLS.	15
III. INCLUDING NON-POINT SOURCES IN THE TMDL PROCESS DOES NOT RAISE FEDERALISM CONCERNS.	19
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	24

## TABLE OF AUTHORITIES

	<u>Pages</u>
<b>CASES</b>	
<i>Alaska Center for the Environment v. Browner</i> , 20 F.3d 981 (9th Cir. 1994)	12, 14
<i>American Farm Bureau Federation v. Browner</i> , Nos. 00-1320, 00-1341, 00-1353 & 00-1384 (D.C. Cir., consolidated)	22
<i>California Association of Sanitation Agencies v. Browner</i> , No. C 00-0424 VRW (N.D.Cal. filed Feb. 7, 2000)	4
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	15
<i>City of Milwaukee v. Illinois &amp; Michigan</i> , 451 U.S. 304 (1981)	9
<i>Dioxin/Organochlorine Center v. Clarke</i> , 57 F.3d 1517 (9th Cir. 1995)	12-14
<i>Helvering v. Hammel</i> , 311 U.S. 504 (1941)	10
<i>In re Pacific-Atlantic Trading Co.</i> , 64 F.3d 1292 (9th Cir. 1995)	10, 15
<i>Natural Resources Defense Council v. U.S. Environmental Protection Agency</i> , 915 F.2d 1314 (9th Cir. 1990)	12
<i>Natural Resources Defense Council, Inc. v. Fox</i> , 93 F.Supp.2d 531 (S.D.N.Y. 2000)	11, 17
<i>New York v. United States</i> , 505 U.S. 144 (1992)	21
<i>Oregon Natural Desert Association v. Dombeck</i> , 172 F.3d 1092 (9th Cir. 1998)	14
<i>Perrin v. United States</i> , 444 U.S. 37 (1979)	10

**TABLE OF AUTHORITIES (CON'T)**

	<u>Pages</u>
<b>CASES (CON'T)</b>	
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	21
<i>Pronsolino v. Marcus</i> , 91 F.Supp.2d 1337 (N.D.Cal. 2000)	7, 15
<i>San Francisco Baykeeper v. Browner</i> , No. C 00-0132 CAL (N.D.Cal. filed Jan. 12, 2000)	4
<i>U.S. v. Gonzales</i> , 520 U.S. 1 (1997)	10
<b>STATUTES AND REGULATIONS</b>	
United States Code, title 33	
§ 1251(a)	9
§ 1311(b)(1)	13
§ 1311(b)(1)(A)	11
§ 1311(b)(1)(B)	11
§ 1311(b)(1)(C)	13
§ 1313(d)	passim
§ 1313(d)(1)	11
§ 1313(d)(1)(A)	5, 13
§ 1313(d)(1)(B)	11
§ 1313(d)(1)(C)	5
§ 1313(d)(1)(D)	11
§ 1313(d)(2)	11, 19
§ 1313(d)(3)	19
§ 1315(b)	3
§ 1329	21
§ 1329(d)	21
§ 1329(h)(1)	21

## TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
<b>STATUTES AND REGULATIONS (CON'T)</b>	
United States Code, title 33 (con't)	
§ 1362(14)	4
Code of Federal Regulations, title 40	
§ 122.44(d)(1)(vii)(B)	7
§ 123.25(a)(15)	7
§ 130.2(i)	17
California Government Code	
§ 11349.3(a)	8
§ 11353(b)	8
California Water Code	
§§ 13240-46	8
§§ 13240-47	19
§ 13242	7
§ 13260	19
§ 13263(a)	7
California Code of Regulations, title 14	
§ 898.1(c)(1)	8
§ 916.3	8
 <b>OTHER AUTHORITIES</b>	
Oliver A. Houck, <i>TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act</i> , 27 ENVTL. L. REP. 10391 (1997)	15
Proposed Revisions to the Water Quality Planning and Management Regulation; Proposed Rule, 64 Fed.Reg. 46012 (August 23, 1999)	6, 20

## TABLE OF AUTHORITIES (CON'T)

### Pages

#### **OTHER AUTHORITIES (CON'T)**

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; Final Rules, 65 Fed.Reg. 43586 (July 13, 2000) 6, 20, 21

U.S. Environmental Protection Agency, The Quality of Our Nation's Waters, A Summary of National Water Quality Inventory: 1998 Report to Congress (EPA841-S-00-001) (June 2000) 3

## INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of the States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey.

*Amici* States are interested in this case because the plaintiffs challenge the federal government's ability to fully implement a critical portion of the Clean Water Act. This program, commonly called the "TMDL" program, is the most important federal program currently in place to assist the States in addressing water pollution caused by non-point sources. In California, like other States, approximately half of the impaired rivers, lakes and other waters are exclusively polluted by non-point sources, including the waterbody which is the subject of this particular case, the Garcia River. While the States have primary responsibility for regulating those who are polluting our waters, the assistance of the federal government is critical in laying the foundation for this endeavor.

The source of authority of the States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey for filing this brief is Federal Rule of Appellate Procedure 29(a).



## INTRODUCTION

Water. In so many different ways, the quality of life we enjoy in the Western states, and across the Nation, depends on the quality of this liquid. We drink it. We swim in it. We fish. We sail and ride in boats. We depend on water to support fish and wildlife. We water our crops. We utilize water for industry. Water could be considered the life blood of our existence.

When we have problems with our water, like poor water quality, we need to all work together. We need to muster all of our legal and technical resources. This includes federal, state and local governmental regulatory power and scientific expertise. And it also means having all citizens – and all polluters – change their practices.

Yet, Appellants Guido and Betty Pronsolino, the Mendocino County Farm Bureau, the California Farm Bureau Federation, the American Farm Bureau Federation, the American Forest & Paper Association and the California Forestry Association (collectively, the "Farm Bureau") seek to exclude themselves, as non-point sources, from a very important part of the Clean Water Act. Doing so would not make for an effective system of water quality planning and regulation. More importantly for the Court's decision-making, the Farm Bureau's strained construction of these statutory provisions is not consistent with the plain language

or purpose of the Clean Water Act. This is why *Amici* States respectfully urge the Court to affirm the District Court's well-reasoned decision, and hold that total maximum daily loads ("TMDLs") developed pursuant to the Clean Water Act must take into account non-point source pollution, and that TMDLs should be compiled for all waterbodies, regardless of what kind of sources exist.

### **STATEMENT OF FACTS**

Pursuant to Section 303(d) of the Clean Water Act (33 U.S.C. section 1313(d)), California has identified 509 water segments that do not meet water quality standards. Other States have also listed hundreds of water quality limited segments (including over a thousand in the State of Oregon, and over six hundred in the State of Washington). These impaired waters vary in length and size, and include rivers, beaches, lakes, bays, estuaries and wetlands. Unfortunately, the States' 303(d) lists include a very significant proportion of the waters in the Nation. Water quality in California, like in other States,<sup>1</sup> is a very serious problem.

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1. Every State has impaired waters. According to the most recent report submitted to Congress under section 305(b) of the Clean Water Act (33 U.S.C. section 1315(b)), of all waters that have been assessed by States, approximately 40% are impaired. *See, e.g.,* U.S. Environmental Protection Agency, *The Quality of Our Nation's Waters, A Summary of National Water Quality Inventory: 1998 Report to Congress* (EPA841-S-00-001) (June 2000).

The pollutants of concern are wide ranging, and include approximately 100 different pollutants, including coliform, sediment, nutrients, PCBs, DDT and other chemicals. On average, there are several pollutants per impaired water segment; in California, for example, there are an average of approximately 2.8 pollutants per impaired water segment.

Approximately half of California's impaired waters are impaired due to a mixture of point sources and non-point sources. *See* 33 U.S.C. § 1362(14) (definition of term "point source"). About the same proportion are impaired due to only non-point sources, and very few are impaired due to only point sources. These proportions are similar in many other States. It is generally acknowledged that non-point sources are both the greatest problem and greatest challenge.

The States' various environmental departments are charged with the task of implementing their TMDL programs. California, for example, conducts its TMDL program through the State Water Resources Control Board and the nine Regional Water Quality Control Boards. Currently, these agencies are working on approximately 100 TMDL projects.<sup>2</sup> Similarly, in Oregon, the Department of

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2. The Court should be aware that two lawsuits are currently pending against the U.S. Environmental Protection Agency, alleging that the federal government has a duty to develop a TMDL for all 509 of California's impaired waters. *See San Francisco Baykeeper v. Browner*, No. C 00-0132 CAL (N.D.Cal. filed Jan. 12, 2000); *California Ass'n of Sanitation Ags. v. Browner*, No. C 00-

Environmental Quality is working on approximately 91 TMDL projects, on a sub-basin level, and in Washington, the Department of Ecology is working on several dozen TMDL projects.

The development of a TMDL is a complex scientific process. (A review of the Garcia River TMDL, at issue here, shows the complexity of the TMDL process.) To develop a TMDL, one must first assess the existing pollution levels throughout the impaired water segment. 33 U.S.C. § 1313(d)(1)(A). Then, one must determine what levels of pollution are acceptable in order to meet water quality standards. *Id.* § 1313(d)(1)(C). This has to take into account seasonal variations, a margin of safety and any lack of knowledge. *Ibid.* California, like other States, often establishes water quality standards in qualitative, narrative terms. For example, one of the water quality standards for sediment applicable to the Garcia River is: "The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses," with specified beneficial uses including drinking water, cold water fishery habitat and recreation. To develop a

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0424 VRW (N.D.Cal. filed Feb. 7, 2000). There are other similar cases in other States. The possibility of a judgment in favor of the plaintiffs in those cases, requiring the development of several hundred TMDLs, highlights the importance of the Court's decision in this case.

TMDL, therefore, one must translate the quantitative data to a qualitative standard. This process can, in some instances, literally take years.

The TMDL itself (which just quantifies the existing pollution and the acceptable level of pollution), however, is simply an informational document. It is a "quantitative assessment of pollutants that cause water quality impairments."

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; Final Rules ("Final TMDL Rules"), 65 Fed.Reg. 43586, 43588 (July 13, 2000). A TMDL provides the scientific foundation for making regulatory decisions. A TMDL is not a regulatory control (like a permit), and Section 303(d) itself does not impose any regulatory limitations on non-point sources. Defendant U.S. Environmental Protection Agency ("US EPA") understands this:

"Section 303(d) does not provide any additional CWA authorities to implement nonpoint source controls[. T]herefore, the [proposed] implementation plan will provide a program to deal with nonpoint source contributions to impaired waterbodies using existing Federal, State and local authorities and voluntary action to implement the allocations contained in TMDLs."

Proposed Revisions to the Water Quality Planning and Management Regulation; Proposed Rule ("Proposed TMDL Rules"), 64 Fed.Reg. 46012, 46033 (August 23, 1999) . *See also* Final TMDL Rules, 65 Fed.Reg. at 43600 ("Nothing in this rule,

however, creates in EPA or the States new legal authority beyond that provided by existing State, Territorial, Tribal or Federal law.") The District Court also understood this. *See Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1355 (N.D.Cal. 2000).

Despite the fact that TMDLs are not regulatory tools, they are very important pieces of the regulatory structure. This is because they provide the factual and scientific foundation for making sound regulatory decisions. Without that scientific data, decisions can be more easily attacked in the policy-making arena and in court. As is often said, "knowledge is power." TMDLs provide the basis for state agencies making sound, defensible, reasoned decisions on regulatory controls to be imposed on both point sources and non-point sources. This is the way we will improve the quality of our water.

These state regulatory decisions can be made in a variety of ways. As to point sources, a TMDL must be taken into account in the development of effluent limitations for NPDES permits. *See* 40 C.F.R. §§ 122.44(d)(1)(vii)(B), 123.25(a)(15). In California, for example, a TMDL will also be made part of the applicable Water Quality Control Plan (also known as a Basin Plan), and implementation is required under state law. *See* Cal. Water Code §§ 13242, 13263(a). Alternatively, other state agencies may take a TMDL into account in

their own regulatory decision-making.

The Pronsolino Non-industrial Timber Management Plan ("NTMP"), at issue in this case, is a perfect example of this. The California Department of Forestry and Fire Protection ("CDF") has a mandate to ensure that timber harvesting activities do not have a significant effect on the environment. *See, e.g.*, 14 C.C.R. §§ 898.1(c)(1), 916.3. CDF, therefore, frequently imposes a wide variety of site-specific mitigation measures to ensure water quality is protected. With the Pronsolino NTMP, CDF simply required that the Pronsolinos explain how they were taking the Garcia River TMDL into account.<sup>3</sup>

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3. With regard to the Pronsolino NTMP, it is interesting to note that the Pronsolinos never objected to the imposition of the TMDL-related requirement, either during the administrative process or by way of an appeal to California's Board of Forestry and Fire Protection. Under general principles of exhaustion of administrative remedies, one would have to inquire if the Pronsolinos have, therefore, waived any right to object to the Garcia River TMDL.

In addition, the Court should be aware that the State of California's TMDL for the Garcia River may well be effective by the time of oral argument on this case. As an amendment to a water quality control plan (also called a Basin Plan), the Garcia River TMDL must be approved by the relevant Regional Water Quality Control Board ("RWQCB"), the State Water Resources Control Board ("SWRCB"), and California's Office of Administrative Law ("OAL"). *See* Cal. Water Code §§ 13240-46; Cal. Gov. Code § 11353(b). The Garcia River TMDL was adopted by the North Coast RWQCB on May 28, 1998, and revised on December 10, 1998. It was approved by the SWRCB on September 21, 2000. We anticipate that the Garcia River TMDL will be submitted to OAL soon, and then OAL must act on it within 30 business days. *See* Cal. Gov. Code § 11349.3(a). US EPA has indicated that once the State Garcia River TMDL is effective, and approved by US EPA, it will withdraw its own TMDL for the Garcia River.

In California and each of the other States, therefore, state and local regulatory bodies make the regulatory decisions affecting non-point sources and point sources. This will not – and should not – change because the federal government develops a particular TMDL.

### **ARGUMENT**

As *Amicus Curiae*, we wish to make three limited points: (1) that the plain language of Section 303(d) of the Clean Water Act does not exclude non-point source pollution; (2) that the Court should refrain from adopting the Farm Bureau's interpretation because excluding non-point sources of pollution from the development of TMDLs will distort that process, and frustrate the purposes of the Clean Water Act; and (3) that the federal government's development of TMDLs enhances, rather than decreases, the States' power to determine the appropriate level of local water quality regulation.

It is helpful, initially, to consider the central purpose of the Clean Water Act. The purpose is straightforward: "The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress' intent in enacting the Amendments [in 1972] was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981).



**I. THE PLAIN LANGUAGE OF THE CLEAN WATER ACT SUPPORTS THE INCLUSION OF NON-POINT SOURCE POLLUTION IN THE DEVELOPMENT OF TMDLS.**

This case involves an issue of statutory interpretation. As such, it is axiomatic that the Court should begin with the actual words of the statute. *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1298 (9th Cir. 1995). The Court must assume that statutory terms and phrases have "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). A court should not imply exceptions to a statute, unless a literal interpretation would result in absurd results or "thwart the obvious purpose of the statute." *Helvering v. Hammel*, 311 U.S. 504, 511 (1941). Moreover, if there is a "straightforward statutory command, there is no reason to resort to legislative history." *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997).

Section 303(d) of the Clean Water Act states, in part:

"(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. . . .

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

necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

33 U.S.C. § 1313(d)(1). (There are parallel provisions related to thermal discharges. *See id.* § 1313(d)(1)(B), (d)(1)(D).)

Under these provisions, the State or US EPA<sup>4</sup> develops a TMDL for those waters identified under the listing provision. Under the listing provision, the State or US EPA identifies those waters "for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement" water quality standards. The Farm Bureau is correct in asserting that these effluent limitations only apply to point sources. However, the next assertion it makes – that therefore only point-source-impaired waters qualify for listing – has no basis in the language of Section 303(d).<sup>5</sup>

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4. If US EPA disapproves a State's listing or TMDL decisions, US EPA has an affirmative duty to establish those listings and TMDLs. *See* 33 U.S.C. § 1313(d)(2). *See also, e.g., Natural Resources Defense Council, Inc. v. Fox*, 93 F.Supp.2d 531 (S.D.N.Y. 2000) (discussing in what circumstances a State's failure to submit TMDLs triggers this duty).

5. At the trial court, the Farm Bureau did not clearly state whether its argument applied to waters only impaired by non-point sources, or to waters with both point sources and non-point sources. In its complaint, the Farm Bureau sought an order that "limits the identification and listing of water segments to those that fail to meet water quality standards due to point sources." (Complaint at 15:22-23.) In its opening brief before this Court, however, the Farm Bureau appears to contend that its argument only applies to waters without any point

The statutory language at issue does not state that it applies only to waters affected by point sources. Nor does it state that non-point sources have to be excluded in the development of a TMDL. Rather, the statute provides that a TMDL only has to be developed if the technology-based limitations for point sources will not obtain the goal of clean water. A 1994 opinion of this Court observed that the TMDL process applies where "technology-based methods of combating pollution from specific point sources have proven inadequate" and for "waters that remain polluted despite the point source controls." *See Alaska Center for the Env't v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994). Thus, point source effluent limitations are an alternative step in implementing water quality standards. This is logical. *See Natural Resources Defense Council v. U.S. Env'tl. Prot. Ag.*, 915 F.2d 1314, 1316 (9th Cir. 1990) ("The Act focused on point source polluters presumably because they could be identified and regulated more easily than nonpoint source polluters.").

But there is simply no indication that if those effluent limitations do not succeed – or even are not applicable because there are no point sources of pollution – then the information-gathering process of developing TMDLs is not required. *See Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1527 (9th

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sources.

Cir. 1995) (holding that a TMDL can be developed for a toxic pollutant even though the effluent limitations referred to in Section 303(d) do not apply). In fact, this Court's decision in *Dioxin/Organochlorine* would seem to contradict such a limitation on TMDLs. In the *Dioxin/Organochlorine* decision, this Court correctly explained that toxic pollutants are not subject to the "best practicable control technology" standard of 33 U.S.C. section 1311(b)(1), but rather are subject to a "best available technology" standard. *Ibid.* Thus, that "best practicable control technology" effluent limitation section – referred to in 33 U.S.C. section 1313(d)(1)(A) – does not technically apply to toxic pollutants such as dioxin. *Ibid.* Nevertheless, this Court held that a TMDL for dioxin was appropriate. *Ibid.* Simply put, the reference to effluent limitations in the TMDL statutory provision is not a limitation on the types of pollution which are covered by the TMDL process.<sup>6</sup> Such a limitation (to sources of pollution regulated by effluent limitations) just *does not exist* in the language of the statute. And, given the broad statutory purpose of the Clean Water Act, the Court should not imply

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6. Similarly, the fact that the TMDL provisions do not make reference to 33 U.S.C. section 1311(b)(1)(C) is irrelevant. That provision just allows States to impose more stringent effluent limitations than required by federal law (the best practicable control technology standard). If States had adopted standards "necessary to meet water quality standards", as allowed by 33 U.S.C. section 1311(b)(1)(C), then there would be no need for the TMDL provisions, since all waters would necessarily meet water quality standards.

such a restriction.

This is why this Court, in discussing TMDLs, has consistently referred to point sources *and* non-point sources.<sup>7</sup> The Court has stated:

"A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue *from all combined sources*. Thus a TMDL represented *the cumulative total of all 'load allocations'* which are in turn best estimates of the discrete loading attributed to *nonpoint sources*, natural background sources, and individual wasteload allocations ('WLAs'), that is, specific portions of the total allocated to individual point sources."

*Dioxin/Organochlorine Center*, 57 F.3d at 1520 (emphasis added). In *Alaska Center for the Environment*, the Court stated that, "Congress and EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution." 20 F.3d at 985.

Therefore, in giving Section 303(d) a meaning based on its plain and ordinary language, the Court should not *imply* a limitation based on the source of

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7. The Farm Bureau attempts to rely on *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), where the Court held that an applicant for a federal grazing permit did not have to obtain certification from the State of Oregon because it was contributing non-point source pollution. However, *ONDA* is easily distinguished: (1) it involved the interpretation of the term "discharge" in Section 401 of the Clean Water Act, not an interpretation of Section 303(d); and (2) it involved the regulatory, not information-gathering, authority of the federal government.

the pollution. The Farm Bureau's interpretation simply has no merit. Like the District Court, this Court need not even rely on the deference accorded to the federal government under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Pronsolino*, 91 F.Supp.2d at 1347 n.12. US EPA's interpretation of the Clean Water Act, in this regard, is not only one reasonable interpretation, it is the *only* reasonable interpretation.

## **II. RULES OF STATUTORY INTERPRETATION SUPPORT THE INCLUSION OF ALL NON-POINT SOURCE POLLUTION IN THE DEVELOPMENT OF TMDLS.**

Even if the Court were to proceed beyond the plain language of this statute, it should endeavor to avoid interpreting this statute in a way that would produce an illogical or unreasonable result. See, e.g., *Pacific-Atlantic*, 64 F.3d at 1303. We submit that the Farm Bureau's suggested interpretation would do so. In fact, one respected commentator has stated that, "TMDLs for point sources alone make no pollution control sense at all." 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. 10391, 10400 (1997).

A TMDL is a scientific, information-gathering exercise. We assess the current water quality of a body of water, and we attempt to determine what level of pollution those waters can tolerate and still meet water quality standards.

This is an exercise focused on the overall water quality of a body of water. In developing a TMDL, it does not matter what the source of the pollution is. In fact, in most cases (especially with sediment), separating out precisely where the existing pollution comes from would be impossible. The practical realities are simply that one cannot assess the overall existing or acceptable level of pollution for a waterbody by examining only part of the problem (and excluding non-point sources).

Moreover, if one excludes non-point sources from the preparation of a TMDL, the TMDL process will lose its utility. The TMDL process, focused on water quality, is a way to link the two primary regulatory schemes for point sources (effluent limitations) and non-point sources (best management practices). Assessing only point sources would also not tell us how to reach water quality standards – the whole purpose of TMDLs – because it excludes the sources contributing the most to the problem: non-point sources.

Including both point and non-point sources in TMDL development also allows for implementation plans to be developed that are effective, efficient and equitable, rather than focusing all of the regulatory burdens on point sources.

As one District Court has noted:

"Without an understanding of the Total Maximum Daily Load, and the various sources which lower a body of water's quality, there is

little chance that the pollution is most efficiently controlled. With the water-quality-based approach, the burden of pollution control can be minimized while maximizing the benefit to the overall quality of the body of water."

*Natural Resources Defense Council, Inc. v. Fox*, 909 F.Supp. 153, 156 (S.D.N.Y. 1995). See also 40 C.F.R. § 130.2(i) ("If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocation can be made less stringent."). Including all sources of pollution provides flexibility to state regulatory agencies. This is especially critical in California and many other States, where we have already achieved sophisticated technological controls on point sources. Our challenge is to impose logical controls on non-point sources. Allowing the regulatory agencies to make those decisions based on the specific circumstances of the region allows us to improve water quality in the most effective and efficient way. Eliminating non-point sources from the scientific foundation for those decisions is simply illogical.

The Farm Bureau seems to acknowledge this by agreeing that TMDLs could be done for waterbodies with any point sources (that is, "blended" waterbodies).<sup>8</sup> Since our goal is to clean up all waters in the Nation, and TMDLs

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8. In a strange twist of logic, the Farm Bureau argues in footnote 10 of its opening brief that TMDLs for "blended" waters "may be used only to reduce



are a means to scientifically analyze what is contributing to water pollution (and how), one has to ask why the existence of *one* point source – no matter how large or small – should determine whether a waterbody should be listed and whether a TMDL should be developed. The existence of one such point source might be entirely fortuitous. Such a standard would necessarily, and foolishly, focus government resources on determining whether one point source – one pipe – discharged into a particular waterbody. And if there were no point sources, the TMDL program – a program meant to ensure regulatory decisions are made based on good science – would abandon that waterbody. To imply such a distinction into the statute just does not make sense, when Congress so clearly wanted to restore the integrity of *all waters*.

These realities are something that the Court should not ignore in interpreting the statute. The Court should use common sense in interpreting the words and practical effect of the competing statutory interpretations. And we believe that this means including all kinds of sources (including non-point sources) in the scientific endeavor of developing a TMDL, and allowing the

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[point source] pollution." As we have explained, TMDLs are informational documents, providing scientific information to the public and the agencies. Once that information is available, the agencies are entitled to use whatever legal authority is provided by law to regulate pollution sources within their jurisdiction.

development of TMDLs for all water bodies which are not meeting water quality standards.

### **III. INCLUDING NON-POINT SOURCES IN THE TMDL PROCESS DOES NOT RAISE FEDERALISM CONCERNS.**

The Farm Bureau and its *amici* supporters contend that the inclusion of non-point sources in TMDLs infringes upon the federalism principles inherent in our Union, and in the structure of the Clean Water Act. These *Amici* States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey disagree.

As has been noted, California law (like other States' statutory law) provides a basis for TMDL-like calculations. *See* Cal. Water Code §§ 13240-47, 13260. Moreover, since Section 303(d) allows for States to develop TMDLs of any water, whether impaired or not, States could complete a TMDL for any waterbody under the Clean Water Act. *See* 33 U.S.C. § 1313(d)(3). However, in enacting the Clean Water Act, Congress understood that the federal government also has a responsibility to assure that TMDLs were developed. *See id.*

§ 1313(d)(2). In an era of many unfunded federal mandates, this is a reassuring acknowledgment of the limited resources and many obligations of State governments. But it is also a necessary recognition that only with the cooperation and combined resources of federal, state and local governments (and interested

and concerned members of the public) will we be able to meet water quality objectives.

At the same time, the development of TMDLs is an information-gathering exercise. It provides the necessary information so that state regulatory agencies can impose appropriate best management practices on land owners, based on applicable state law. Consistent with this framework, the federal government acknowledges that the TMDL program created by the Clean Water Act does not impose regulatory requirements on non-point sources. *See Proposed TMDL Rules, 64 Fed.Reg. at 46033; Final TMDL Rules, 65 Fed.Reg. at 43600-01.*<sup>9</sup> Thus, the federal government's TMDL program provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power. By empowering States, this process actually enhances state and local control.

The Farm Bureau makes much of supposed threats made by federal officials to state agencies. However, the federal government has as much right as any individual or entity (such as the Farm Bureau) to attempt to influence state

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9. US EPA's new regulations, which require implementation plans, do not change this. (Of course, by act of Congress, those regulations are not in effect currently, were not in effect when the challenged actions were taken, and will not be in effect for some time.)

regulatory decisions. It is true that US EPA has significant powers (and therefore leverage) under Section 319 of the Clean Water Act. *See* 33 U.S.C. § 1329. These powers allow US EPA to approve state plans regarding non-point sources. *See id.* § 1329(d). But, generally, the impact of any adverse federal decision on these plans is limited to the withholding of federal grant money. *See id.* § 1329(h)(1). *See also* Final TMDL Rules, 65 Fed.Reg. at 43600 (describing various ways US EPA conditions federal grant moneys). US EPA understands that it "cannot, of course, require States, Territories or authorized Tribes to use their own statutory or regulatory authorities to provide reasonable assurance for EPA." *Ibid.* *See also id.* at 43632 (discussing how US EPA will implement TMDLs it establishes). And US EPA understands that, "In developing implementation plans State and local governments are accorded significant flexibility to choose which management measures and other activities [t]hey will undertake to implement the load and wasteload allocations in a TMDL." *Id.* at 43659. US EPA's power is also limited by the Tenth Amendment, and other Constitutional limits. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). In any event, if the federal government attempts to wield too much power, the States are fully capable of asserting and protecting their sovereignty.

Alternatively, if the Farm Bureau believes that US EPA is taking steps beyond the information-gathering establishment of TMDLs, and actually imposing regulatory requirements directly on individuals and businesses, the Farm Bureau can certainly challenge those practices as beyond US EPA's authority. And if the Farm Bureau (or others, including the States) believe that US EPA's regulations are improper, it can certainly challenge those regulations.<sup>10</sup> But those issues are separate from the issue presented by this action: whether US EPA has the authority to develop TMDLs for waters impaired by non-point sources. The Court should not allow the Farm Bureau and its *amici* supporters to distract the Court from this issue.

### CONCLUSION

To anyone who has seen their children play in a lake or river, and to anyone who has seen the salmon spawn, we owe our best efforts to improve the quality of our Nation's waters. We still have many serious water quality problems, which at this juncture are caused primarily by non-point sources. The goal of clean water demands our attention, and it demands our collective resources.

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10. In fact, several farm and timber industry groups have challenged US EPA's new TMDL regulations by way of petitions for review now pending before the D.C. Circuit. See *American Farm Bureau Federation v. Browner*, Nos. 00-1320, 00-1341, 00-1353 & 00-1384 (D.C. Cir., consolidated).

The Farm Bureau and their *amici* supporters seek to limit the reach of the Clean Water Act to protect their own interests, at the expense of our needed efforts to improve water quality. But the Clean Water Act does not support their arguments. A reasonable interpretation of the Section 303(d) of the Clean Water Act includes all sources of pollution in our efforts to improve water quality. And because of that, *Amici Curiae* States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey respectfully request that the Court affirm the decision of the District Court.

DATED: December 4, 2000

BILL LOCKYER, Attorney General  
of the State of California

RICHARD M. FRANK

Chief Assistant Attorney General

MARY E. HACKENBRACHT

Senior Assistant Attorney General



MARC N. MELNICK

Deputy Attorney General

Attorneys for *Amici Curiae*

[Additional Counsel Listed on First Inside Page]

**CERTIFICATE OF COMPLIANCE**

I certify that, pursuant to Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: December 4, 2000



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MARC N. MELNICK  
Deputy Attorney General  
California Attorney General's Office  
Attorney for *Amici Curiae*

## PROOF OF SERVICE

**CASE:** Guido A. Pronsolino, et al. v. Felicia Marcus, et al.

**NO:** U.S. Court of Appeals for the Ninth Circuit  
Nos. 00-16026 and 00-16027

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On December 4, 2000, I served the following document(s):

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WASHINGTON, DELAWARE, MAINE, MARYLAND, AND NEW JERSEY IN  
SUPPORT OF APPELLEES***

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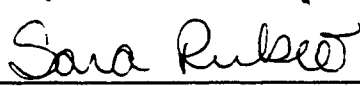
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C	SEAN H. DONAHUE Environment and Natural Resources Division Department of Justice 601 D Street NW, Room 8602 Washington, D.C. 20004
C	RUSSELL R. EGGERT Mayer, Brown & Platt 190 South LaSalle Street Chicago, IL 60603-3441
C	J. MICHAEL KLISE Crowell & Moring 1001 Pennsylvania Avenue Washington, D.C. 20004
A	LaJUANA S. WILCHER LeBoeuf, Lamb, Greene, MacRae, LLP 1875 Connecticut Avenue, Suite 1200 Washington, D.C. 20009-5728
A	JOSEPH J. BRECHER Brecher & Volker, LLP 436 14th Street, Suite 1300 Oakland, CA 94612
A	ANNE M. HAYES Pacific Legal Foundation 10360 Old Pacerville Road, Suite 100 Sacramento, CA 95827
A	LAWRENCE S. BAZEL Washburn, Briscoe & McCarthy 55 Francisco Street, Suite 600 San Francisco, CA 94133

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on December 4, 2000 at Oakland, California.

  
\_\_\_\_\_  
Sara Rubio