Nos. 00-16026 and 00-16027

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDO A. PRONSOLINO, et al.,
Plaintiffs-Appellants,
AMERICAN FOREST AND PAPER ASS'N, et al.,
Intervenors-Appellants,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees,
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC., et al.,
Intervenors-Appellees.

OPPOSITION OF THE DEFENDANTS-APPELLEES TO THE PETITION FOR REHEARING AND REHEARING EN BANC

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This is an appeal of a district court judgment upholding the United States Environmental Protection Agency's ("EPA's") interpretation of Section 303(d) of the Clean Water Act ("CWA"), 33 U.S.C. 1313(d). EPA interprets the Act to require the listing of, and the establishment of total maximum daily loads ("TMDLs") for, all waters for which technology-based effluent limitations are insufficient to achieve compliance with water quality standards ("WQSs"). The panel affirmed the judgment of the district court, finding EPA's interpretation to be a "more than reasonable" reading of the CWA. For the reasons explained below, the Petition for Rehearing or Rehearing en Banc should be denied.

STATEMENT OF THE CASE

A. **Statutory And Regulatory Background**. The CWA is an integrated and complex water pollution control regime established through multiple congressional enactments "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 303(d)'s role in the CWA's pollution control framework must be analyzed in the context of the two overarching strategies that the CWA employs to control water pollution: (1) a "technology-based approach" that applies exclusively to point sources and generally relies on federally promulgated technology regulations; and (2) a "water quality-based approach" that is based on in-stream WQSs and that is a safety-net in case the technology-based approach is inadequate.

1. The Technology-Based Approach: Section 301 - Effluent Limitations on Point Sources. The 1972 Amendments to the Federal Water Pollution Control Act (known as the Clean Water Act) prohibited the discharge of any pollutant from

point sources, 33 U.S.C. 1311(a), except as specifically allowed by statute or permit.[1]/ Under the National Pollutant Discharge Elimination System (NPDES) permit program, Congress authorized EPA and States to issue permits to point sources. 33 U.S.C. 1342. Congress authorized EPA, in Sections 301 and 304, to establish technology-based effluent limitation guidelines on point source dischargers, 33 U.S.C. 1311(b)(1)(A),(B), (b)(2), 1314, and to require CWA permits to include effluent limitations reflecting technology-based requirements and any more stringent requirements necessary to meet WQSs. 33 U.S.C. 1311(b).

2. <u>The Water Quality-Based Approach: Section 303 - Water Quality Standards and Their Implementation</u>.

a. <u>Water Quality Standards</u>. Under Section 303(c) of the CWA, States, with federal approval and oversight, adopt WQSs for all waters within their boundaries. 33 U.S.C. 1313(c). In adopting a WQS, a State defines the water quality goals of a waterbody by designating its intended uses, 33 U.S.C. 1313(c)(2)(A), 40 C.F.R. 131.3(f), 131.6(a), 131.10, and specifying criteria – which can be numeric or narrative – necessary to protect the designated uses. 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(b), 131.6(c), 131.11. A WQS is source-neutral: it is concerned with the quality of the water, not the activity that generated the pollutant. In 1972, when Congress created the NPDES permit program for point sources, it preserved an important role for WQSs by "extend[ing] and expand[ing] the water quality standards procedure initiated in the Water Quality Act of 1965." Comm. On Public Works, 93d

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[1]/ The Act provides that: "The term 'point source' means any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

Cong, 1st Sess., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 171 (Comm. Print 1973). By retaining WQSs in the Act, Congress maintained a safety net to ensure that water quality would be protected in the event technology-based controls were not sufficient. See NRDC v. EPA, 915 F.2d 1314, 1317 (9th Cir. 1990).

b. Water Quality Limited Segments and TMDLs. Section 303(d)(1)(A) requires each State to identify and prioritize those waters for which technology-based controls are inadequate to attain WQSs:

> 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.

33 U.S.C. 1313(d)(1)(A). The State's identification of such substandard waters, which are known as "water quality limited segments" ("WQLSs"), constitutes the "303(d) list." See 40 C.F.R. 130.7(b). For all waters identified under Section 303(d)(1)(A) as exceeding WQSs, the States are to establish "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." 33 U.S.C. 1313(d)(1)(C). The TMDL is to be set 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." Id. Thus, a TMDL identifies the maximum amount of a pollutant that can be added to a waterbody ("its loading capacity") without exceeding the WQS for that pollutant. See Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 1520 (9th Cir. 1995) ("Dioxin"). The CWA provides that EPA must approve or disapprove State-

submitted 303(d) lists and TMDLs within 30 days of their submission. 33 U.S.C. 1313(d)(2). If EPA disapproves a 303(d) list, it must identify the WQLSs that should be on the list within 30 days from the date of disapproval. Id. If EPA disapproves a State TMDL, EPA must issue its own TMDL within 30 days. Id.

c. Section 303(e) and the Continuing Planning Process. In Section 303(e), Congress required each State to develop a "continuing planning process" that would result in plans for all waters within the State. See 33 U.S.C. 1313(e)(3). These plans are required to include TMDLs and "adequate implementation" for new and revised WQSs. See 33 U.S.C. 1313(e)(3)(F). States are required to submit their continuing planning processes to EPA for review and approval. 33 U.S.C. 1313(e)(2).[2/]

d. Implementation of TMDLs. TMDLs are not regulations, and they are not self-executing. Instead, TMDL allocations to point sources are implemented through NPDES permits. 40 C.F.R. 122.44(d)(1)(vii)(B). Thus, a State such as California, that has assumed administration of the NPDES permit program, would require the necessary reductions from point sources by imposing discharge limitations in NPDES permits issued to individual dischargers. Implementation of TMDL allocations to nonpoint sources is at the discretion of the State, since the CWA provides no regulatory mechanism to control nonpoint sources of pollution. See NRDC, 915 F.2d at 1316. EPA, acting pursuant to CWA Section 319(h), 33 U.S.C.

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

1329(h), disburses funds to the States to assist them with implementation of nonpoint source management programs, including the development of best management practices to control nonpoint source pollution. See NRDC, 915 F.2d at 1318. "Section 319 does not require states to penalize non-point source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices." Id. EPA has no authority to enforce TMDL pollutant loading reductions against nonpoint sources or to require a State to do so.

B. The Garcia River TMDL and This Litigation. Because the Garcia River did not meet the WQS for sediment, EPA included the Garcia River on California's 303(d) list of waters in 1992, after the State failed to do so. ER Tab 86 at ¶¶ 4-5.[3/] California's subsequent lists included the Garcia River. id. ¶ 8. Eventually, EPA was sued due to the pace of TMDL development for various northern California rivers, including the Garcia River. Pacific Coast Federation of Fishermen's Association v. Marcus, No. 95-4474 MHP (N.D. Calif.). That case ended in a consent decree in which EPA committed to a deadline for establishing a TMDL for the Garcia River. Pursuant to that decree, EPA established the Garcia River TMDL on March 16, 1998. ER Tab 86 at 3.

In 1998, the Pronsolinos applied to the California Department of Forestry ("CDF") for a permit to harvest timber on their land in the Garcia River watershed. Under State law, CDF is charged with ensuring that timber harvesting does not have a significant effect on the environment. See, e.g., 14 C.C.R. 898.1(c)(1), 916.3. CDF

3/ For the Garcia River, California established narrative criteria to ensure that sediment shall not cause "nuisance or adversely affect beneficial uses" such as spawning of fish. ER Tab 91, Att. 1 at 9.

granted the Pronsolinos a permit containing provisions consistent with the TMDL. ER Tab 86 at 7. The Pronsolinos and various agricultural organizations thereafter filed this suit.

The district court concluded that Sections 303(d)(1) and 303(d)(2) require listing of, and TMDLs for, polluted waters for which effluent limitations are insufficient to attain WQSs regardless of the source of the pollutant. Pronsolino v. Marcus, 91 F. Supp.2d 1337 (N.D. Cal. 2000). The district court also concluded that plaintiffs' repeated contentions that EPA had sought to "regulate" nonpoint sources of pollution rested on mischaracterizations of EPA's position and the TMDL program. The function of a TMDL, the court noted, is to identify the load reductions necessary to implement the WQS rather than to regulate land use; "California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL * * * or even to refuse to implement them." Id. at 1555. Accordingly, the court granted summary judgment for the defendants. That decision was affirmed by a panel of the Ninth Circuit in Pronsolino v. Nastri, 291 F. 3d 1123 (9th Cir. 2002).

STANDARDS FOR REHEARING AND REHEARING EN BANC

The Federal Rules of Appellate Procedure explicitly recognize that en banc rehearing is "not favored and ordinarily will not be ordered," except when consideration is necessary to secure or maintain uniformity of decisions or when a case involves a question of exceptional importance. Fed. R. App. P. 35(a). "Under this rule, it is well-understood that it is only in the rarest of circumstances when a case should be reheard en banc." Bartlett v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987 (Edwards, J., concurring in the denials of rehearing en banc). Under Rule 40(a)(2), a

party seeking panel rehearing is required to demonstrate with particularity that the opinion has overlooked or misapprehended one or more points of law or fact.

ARGUMENT

The Court should deny rehearing en banc because the purported question of "exceptional importance" that appellants identify -- whether EPA can regulate waters that are polluted solely by "nonpoint sources," see Petition at 1 -- is not, and has never been, at issue in this case. EPA agrees that it has no such authority, and both the district court and panel so ruled. Furthermore, the intra- and inter-circuit conflicts that appellants manufacture -- using their false question of "exceptional importance" -- are fictional. Therefore, appellants fail to satisfy the requirements for rehearing en banc.

The request for panel rehearing also is meritless. Appellants repeatedly suggest that this Court overlooked or misapprehended important aspects of the CWA. Petition at 7-12. To the contrary, the appellants' arguments were presented, understood, considered, and properly rejected by the panel. No further review of these issues is warranted.

A. The Panel's Interpretation of the CWA is Correct and Does Not Merit Further Review.

1. The Panel Correctly Read Section 303(d) to Require the Listing of, and the Establishment of TMDLs for, All Waters for Which Effluent Limitations are Inadequate to Implement Any Applicable WQS. The parties have never disputed that WQSs are required for all waters within a State.[4]/ 33 U.S.C.

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[4]/ As the district court noted, "[a]ll parties agree" that WQSs required under Section 303 "plainly applied to waters polluted by point sources as well as non-point sources, either alone or in combination." Pronsolino, 91 F.Supp.2d at 1343.

1313(a), (b). See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 704 (1994) (observing that the CWA requires that States establish WQS "for all intrastate waters"). To ensure that substandard waterbodies are identified, Section 303(d)(1)(A) requires States to list waters for which effluent limitations "are not stringent enough" to implement the applicable WQS. EPA interprets Section 303(d)(1)(A), therefore, to apply whenever effluent limitations required by applicable technology-based regulations are insufficient to bring waters into attainment with their WQSs. As the panel held, EPA's interpretation is entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) and United States v. Mead, 533 U.S. 218, 226-27 (2001), and at the very least, to deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). EPA's interpretation meets either standard. Pronsolino, 291 F.3d at 1130-34.

Appellants' concept of when effluent limitations are "not stringent enough" within the meaning of Section 303(d) is too narrow and ignores the purpose of Section 303(d) to ensure the implementation of WQSs. As the panel correctly concluded, effluent limitations are "not stringent enough" when they are "not thoroughgoing enough" or "inadequate" or "insufficient" to meet WQSs, as well as when the limits on existing point source discharges are not strict enough. Pronsolino, 291 F.3d at 1135-36 & n.14. When a waterbody is impaired solely by nonpoint source pollution, effluent limitations will necessarily be inadequate to bring the water into compliance with the applicable WQS since they only apply to point source pollution. Reading "not stringent enough" to include all instances in which effluent limitations are inadequate to implement WQSs is consistent with the dictionary meaning of the phrase and also with the legislative history, in which the House Report used the term "are

inadequate" in place of "not stringent enough," Pronsolino, 291 F.3d 1136 n.14 (citing 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 792 (1973) (H.R. Rep. 92-911 to accompany H.R. 11896 (March 11, 1972)). The panel thus reasonably concluded that effluent limitations are "not stringent enough" whenever they are inadequate to attain the applicable WQS.

The panel's reading of the phrase "not stringent enough" is also consistent with the purpose of Section 303(d)(1)(A) to "implement any water quality standard applicable to" the waters within a State.[5/] Pronsolino, 291 F.3d at 1135-36. Because WQSs apply without regard to the source of the pollution, that goal would be ill-served by limiting TMDLs to only a subset of the State's waters or to only a subset of the pollution sources impairing those waters. While appellants claim that the panel relied upon the purpose of Section 303(d)(1)(A) in derogation of its language, Petition at 10, the panel considered the purpose of the provision to select the best interpretation of the statutory text. This was not only permissible but essential. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Regions Hospital v. Shalala, 522 U.S. 448, 460 n.5 (1998).

According to Appellants, Section 303(d)(1)(A) only applies to a waterbody impaired by point source pollution where effluent limitations have been or will be insufficient for the waterbody to achieve compliance with an applicable WQS and does not apply where effluent limitations are inadequate to bring a waterbody into

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[5/] That TMDLs were intended to implement WQSs for all water bodies is also reflected in other provisions of section 303(d). Section 303(d)(1)(C), for example, provides that "loads" (i.e., TMDLs) "shall" be established *"at a level necessary to implement the applicable WQS."* 33 U.S.C. 1313(d)(1)(C) (emphasis added).

compliance with a WQS because the waterbody is impaired only by nonpoint sources of pollution.[6]/ They argued that Section 303(d)(1)(A) must be read to exclude waters impaired by nonpoint source pollution from the Act's water quality-based approach even though WQSs plainly apply to such waters. Petition at 7-8. This argument, based on purportedly implied congressional intent, should be rejected in favor of EPA's reasoned interpretation. See Dioxin, 57 F.3d at 1525, citing Chevron ("A court should accept the 'reasonable' interpretation of a statute chosen by an administrative agency except when it is clearly contrary to the intent of Congress."), 467 U.S. at 842-44 (emphasis added).

Had Congress intended to limit the listing and TMDL development requirements of Sections 303(d)(1) and 303(d)(2) to point sources, it could have said precisely that. Indeed, Congress included language in CWA Section 304(*l*)(1)(B) specifically limiting the application of that section only to waters impaired by point source pollution. 33 U.S.C. 1314(*l*)(1)(B).[7]/ The absence of such language in Section 303(d) is a telling indication that no such limitation was intended in that provision. See City of Chicago

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[6]/ Appellants do not question the applicability of TMDLs to "blended waters," i.e., waters impaired by both point sources and nonpoint sources of pollution. As noted by the panel, nothing in the statutory structure or purpose even suggests that Congress meant to distinguish, as to 303(d) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution, and waters with only nonpoint source pollution. Pronsolino, 291 F.3d at 1139.

[7]/ CWA Section 304(*l*)(1)(B) requires States to submit to EPA "a list of all waters in such State for which the State does not expect the applicable standard under Section 1313 of this title will be achieved after the requirements of Sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or *substantially to discharges from point sources of any toxic pollutants* listed pursuant to Section 1317(a) of this title." (emphasis added).

v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) ("We agree with respondents that this provision 'shows that Congress knew how to draft a waste stream exemption . . . when it wanted to.'").

2. The Panel's Decision is Consistent with the Statutory Scheme and the Legislative History. The panel reviewed the statutory structure and legislative history and concluded that its interpretation of Section 303(d)(1)(A) was consistent with both. Pronsolino, 291 F.3d at 1137-39. Section 303(d), the panel noted, is preceded by Sections 303(a)-(c), which establish the requirements for WQSs without regard to the source of the pollution. And Section 303(e) provides for a continuing planning process that is to include TMDLs for "pollutants," not just TMDLs for point source pollution. That planning process covers nonpoint as well as point sources. Id. at 1138. Thus, Section 303(d) falls within a set of provisions that apply without regard to the source of the pollution. Id.

The panel correctly rejected appellants' claim that the CWA as a whole invariably treats point source pollution and nonpoint source pollution separately, and that this separate treatment should guide the interpretation of Sections 303(d)(1)(A) and (C). Id. at 1137-38. The CWA lacks the rigid division that appellants imply. See generally Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002)("TMDLs are central to the Clean Water Act's water-quality scheme because . . . they tie 'together point-source and nonpoint source pollution issues in a manner that addresses the whole health of the water.'")(citations omitted). The fact that some provisions are directed solely at nonpoint source pollution does not compel the conclusion that no other provisions concern nonpoint pollution.

The petition does little more than repeat appellants' backup arguments based on CWA Sections 208, 319, and 303(d)(3), 33 U.S.C. 1288, 1329, and 1313(d)(3). Petition at 10-11. Sections 208 and 319, among other things, encourage States to develop programs to identify and manage nonpoint source pollution. Appellants suggest that establishing TMDLs for waters impaired only by nonpoint sources will be inconsistent with these provisions because doing so will supplant flexible State programs with "TMDL requirements." Id. This argument misapprehends the nature of TMDLs. As both the district court and the panel explained, TMDLs provide information on the reductions in pollutant loadings needed to achieve compliance with WQSs. 91 F. Supp.2d at 1355; 291 F.3d at 1140. TMDLs do not themselves impose requirements on sources of pollutants, and the States retain the discretion whether and how to implement any nonpoint pollutant loading reductions. Id. Far from creating an irreconcilable conflict with State regulation, TMDLs complement and assist States in addressing nonpoint source pollution by identifying the pollutant reductions needed to achieve compliance with the applicable WQS.

Appellants' argument that Section 303(d)(3) conflicts with the panel's reading of Section 303(d)(1)(A) is also without merit. Petition at 11. Section 303(d)(3) provides that States "estimate" TMDLs for all waters that they have not listed under Section 303(d)(1)(A). Contrary to appellants' misleading description, Section 303(d)(3) does not even mention "effluent limitations", and like the rest of Section 303(d), draws no distinction between point and nonpoint sources.

Finally, appellants' attempt to rely on legislative history to support their narrow reading of Section 303(d)(1)(C) is unavailing. Petition at 12. Appellants cite to irrelevant legislative history indicating that when technology-based effluent limitations

prove inadequate to implement WQSs, point sources may be required to meet more stringent effluent limitations. Petition at 12. EPA has never disputed this point. In any event, it hardly follows that Congress intended Section 303(d)(1) not to apply to waters impaired by nonpoint source pollution. See 291 F.3d 1139 n.17. When faced with similar attempts to argue from scraps of legislative history, courts have generally rejected efforts to limit the reach of the statute to the examples in the legislative history, because it is sheer speculation to assume that Congress intended such a limitation. See Moskal v. United States, 498 U.S. 103, 111 (1990) (the Supreme Court "has never required that every permissible application of a statute be expressly referred to in its legislative history"); Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 649 (1990); United States v. Turkette, 452 U.S. 576, 591 (1981); Florida Public Telecommunications Ass'n v. F.C.C., 54 F.3d 857, 861 (D.C. Cir. 1995); R.E. Dietz Corp. v. United States, 939 F.2d 1, 7 (2d Cir. 1991). There is no legislative history showing that Congress intended to exclude waters impaired by nonpoint source pollution from the reach of Section 303(d).

B. The Panel's Decision is Consistent with Other Decisions of this Circuit and Other Circuit Courts of Appeals. There is no intra- or inter-circuit conflict concerning the interpretation of CWA Section 303(d). The cases appellants cite either do not interpret Section 303(d) or stand for a point not in dispute here, i.e., that the CWA does not authorize EPA to regulate nonpoint source pollution.

For example, appellants mistakenly assert that Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) ("ONRC") is inconsistent with the panel's holding. Petition at 13-15. In ONRC, the Court held that CWA section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C), does not apply to nonpoint

source pollution. However, Sections 301 and 303 concern quite different matters. Section 301 is entitled "Effluent Limitations," and Section 301(b)(1) concerns methods for deriving effluent limitations. Effluent limitations only apply to discharges from point sources. 33 U.S.C. 1362(11). For that reason, the Court concluded that Congress did not intend Section 301(b)(1)(C) to apply to nonpoint source pollution. 834 F.2d at 850. Section 303, in contrast, concerns water quality standards and implementation plans, which apply to all waters without regard to the source of pollution. The ONRC Court said nothing about the scope of Section 303(d), and the decision provides no support for appellants' view that the Section 303(d)(1) listing requirement turns on the source of pollution in substandard waters.

In Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) ("ONDA"), the Court held that the term "discharge" in Section 401 of the Act, 33 U.S.C. 1341, did not include releases of pollutants from nonpoint sources. Section 401 deals with licenses or permits for discharges into navigable waters. The term "discharge" does not even appear in Sections 303(d)(1)(A), 303(d)(1)(C), or 303(d)(2). Thus, the ONDA Court's holding that Section 401(a)(1) "discharges" do not include runoff from nonpoint sources does not address, let alone answer, the scope of the provisions at issue in this case. Nevertheless, appellants cite the Court's statement in ONDA that Section 303 "does not itself regulate nonpoint source pollution." Petition at 13 (quoting 172 F.3d at 1097). That is entirely consistent with EPA's position and the panel's decision.

The remainder of appellants' efforts to show a conflict consists of allusions to various decisions for a point not disputed by EPA, the district court, or the panel – that the CWA does not authorize EPA to regulate nonpoint source pollution. Petition

at 15-17 (citing, *e.g.*, American Wildlands v. Browner, 260 F.3d 1192, 1997 (10th Cir. 2001); Sierra Club v. Meiburg, 296 F. 3d 1021 (11th Cir. 2002); and Appalachian Power v. Train, 545 F.2d 1351 (4th Cir. 1976)). TMDLs do not supplant State control of nonpoint source pollution, but rather provide important information for the use of States in their efforts to determine the pollutant loading reductions that are needed to attain the WQS. The panel's decision did not construe the CWA to authorize EPA to regulate nonpoint source pollution, but rather to approve or develop TMDLs to be used by States in their efforts to ameliorate the effects of nonpoint source pollution in the substandard waters under their jurisdiction. There is no inconsistency between the panel's decision and the fact that the CWA "generally leaves regulation of nonpoint source discharges through the implementation of TMDLs to the states." Meiburg, 296 F.3d at 1025.

CONCLUSION

The Petition for Rehearing and Rehearing en Banc should be denied.

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