Nos. 00-16026 and 00-16027

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUIDO A. PRONSOLINO, *et al.*, Plaintiff-Appellants,

AMERICAN FOREST & PAPER ASSOCIATION and CALIFORNIA FORESTRY ASSOCIATION, Intervenor-Appellants,

v.

FELICIA MARCUS, Regional Administrator, United States Environmental Protection Agency Region 9, et al.,

Defendant-Appellees.

Appeal from the United States District Court for the Northern District of California, No. CV-99-01828-WHA

REPLY BRIEF OF INTERVENOR-APPELLANTS

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The American Forest & Paper Association ("AF&PA") and the California Forestry Association ("CFA") reply here with respect to those portions of the briefs of the Environmental Protection Agency ("EPA") and its intervenor and *amici* supporters that address issues raised in our Opening Brief. More precisely, AF&PA and CFA take this opportunity to show that two critical points relied on by EPA and its supporters have already been refuted in our opening brief, which appears to have been essentially ignored.[1]

The first of these points focuses on the need to account for nonpoint source ("NPS") contributions in so-called "blended" waters affected by both point source ("PS") and nonpoint sources. The second emphasizes the purported information-gathering role of TMDLs and EPA's position that it is not forcing the regulation of nonpoint source activities.

[1] As best we can tell, despite obtaining a 1,400-word enlargement of the word limit to respond to multiple briefs, EPA and its supporters cite our opening brief only once in a total of 110 pages of appellees', intervenors', and *amicus* briefs – and then, oddly enough, after complaining that one of the two arguments we fully presented (concerning the treatment of "blended waters") was "bur[ied]" in a footnote in plaintiff-appellants' opening brief. *See* EPA Br. at 46.

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectuation of congressional intent.

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1985).

As Plaintiff-Appellants have shown, the language of section 303(d)(1) of the CWA does not permit, much less require, subsuming nonpoint-source impaired waters under the TMDL regime of section 303(d)(1) of the Act. Pronsolino Br. at 17-24. The overall goal of the CWA – restoring and maintaining the integrity of the nation's waters – dictates no different result, because section 303(d) appropriately works in harmony with sections 319 and 208 to address both point and nonpoint sources of impairment, albeit through separate mechanisms with *intentionally varying degrees of federal involvement*. *See* AF&PA Br. at 8-13. Indeed, it is this lesser degree of federal oversight and control – not EPA's blunderbuss approach under section 303(d)(1) – that makes the programs established pursuant to sections 319 and 208 the *only* valid federal means of encouraging nonpoint source controls consistent with Congress's design.

Therefore, to the extent that section 303(d) TMDLs address nonpoint source impairment, that can only be by way of: (1) *accounting for* nonpoint source contributions in blended waters, through EPA-approved TMDLs under section 303(d)(1); or (2) informational TMDLs developed by States alone, pursuant to section 303(d)(3).

EPA mischaracterizes Appellants' and Intervenor-Appellants' position in an effort to make it seem absurd. For example, EPA argues that under our view it would be *impossible* to establish TMDLs at a level "necessary to implement water quality standards" on certain blended waters. EPA Br. at 47, n.24. EPA poses a hypothetical in which an impaired water contains 20 units of pollutant from a blend of point and nonpoint sources, where 10 units is the applicable water quality standard. According to EPA, if point sources accounted for only 9 units of the current impairment, it would be impossible to establish a TMDL at a level "necessary to implement the water quality standard," even if the State or EPA were to "zero out" the point source contribution. *Id.*

EPA's hypothetical dilemma is pure fiction and is certainly not a necessary result of a properly limited role for section 303(d)(1). Instead, under the circumstances posed, the State (or EPA) would presumably establish the total maximum daily load at 10 units, *i.e.* the amount necessary to meet water quality standards. To allocate portions of this load among point sources along the water,

the State (or EPA) would reasonably *take into account* the fact that 11 units of pollutant result from nonpoint sources and, accordingly, establish wasteload allocations among the point sources at some reasonable level consistent with water quality standards. Nonpoint sources would not, however, receive "allocations" of allowable loads, because the CWA does not require the establishment of quantitative loading limits for nonpoint sources and does not authorize EPA to approve or to take-over the establishment of any such limits. *See* AF&PA Br. at 12 (explaining section 303(d)(1) ability to account for nonpoint sources without establishing enforceable load allocations for those activities).

In addition, because nonpoint sources controls would be necessary to achieve water quality standards, the State would list the water pursuant to CWA section 319 and use its nonpoint source management program to achieve the desired reduction in nonpoint source loading. This is *precisely* the role intended for section 319 – to address waters which "without additional action to control *nonpoint* sources of pollution, *cannot reasonably be expected to attain or maintain applicable water quality standards*." 33 U.S.C. § 1329(a)(1)(A) (emphasis added). Congress expressly recognized that there would be waters which require nonpoint source controls in order to achieve water quality standards, and it enacted section 319 specifically to provide a federal mechanism for encouraging and funding State

efforts to implement such controls.[2] Thus, in EPA's hypothetical, the combination of the TMDL allocation for point sources and the reduction achieved under section 319 for nonpoint sources will result in the attainment of water quality standards.

We hasten to add, as Appellants have stated, that it is entirely unnecessary for this Court to prescribe the manner in which EPA and the States should implement section 303(d) for blended waters, because that issue is not presented in this case. We simply offer this rebuttal to set to rest the allegation that we would have the Court "ignore the logical implications" of maintaining the point source-focussed role of section 303(d)(1) that Congress intended. EPA Br. at 47. The complementary nature of sections 303(d) and 319, as well as section 208, makes the statutory scheme entirely workable and ultimately effective; but it leaves to States the task of establishing any limits applicable to nonpoint source activities.

II. EPA-APPROVED OR EPA-ESTABLISHED TMDLs SETTING "ALLOCATIONS" FOR NONPOINT SOURCES ARE ACTION-FORCING DEVICES THAT EFFECTIVELY REQUIRE STATE REGULATION OF NONPOINT SOURCES

As it admitted to the district court, EPA "readily agrees that [it] cannot *regulate* NPS pursuant to Section 303(d) by *requiring* load reductions from NPS."

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[2] Whatever shortcomings EPA may perceive in this approach, it is up to Congress to make the changes. "The statute may be imperfect, but [EPA] has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Dimension Financial*, 474 U.S. at 374.

EPA Br. at 64 (emphasis in original). However, EPA refuses to address – indeed it ignores entirely – the gross inconsistencies between those words and the agency's actions, both with respect to the Garcia River TMDL in this case and the agency's newly final TMDL regulations. *See* AF&PA Br. at 5-7 (discussing EPA's revised TMDL rules published at 65 Fed. Reg. 43,586-670 (July 13, 2000)).[3]

Our discussion of those regulations is not a peripheral matter, but rather underscores the stark contrast between the federal-state relationship envisioned by Congress in the CWA and the markedly different regulatory approach practiced by EPA. As explained in our opening brief, EPA's new TMDL rules mandate nonpoint source load reductions in no uncertain terms. They *require* that all States provide EPA with "*reasonable assurance*" that load allocations for nonpoint sources "*will be implemented and achieve the assigned load reductions*." 65 Fed. Reg. at 43,668 (emphasis added). "Reasonable assurance" means a demonstration that "management measures or other control actions ... *will be implemented* as expeditiously as practicable [and] *will be accomplished* through reliable and effective delivery mechanisms." 65 Fed. Reg. at 43,663 (emphasis added). These

[3] EPA offers no rebuttal to our argument based on the new regulations. Indeed, EPA's only reference to them is buried in a footnote that merely identifies the date of their promulgation and their effective date, and claims that they "reiterat[e] EPA's longstanding interpretation that section 303(d)(1) applies to impaired waterbodies regardless of pollutant source." EPA Br. at 9 n.2.

requirements squarely contradict EPA's protest that any regulatory imposition of load limits will occur "only because a State has *chosen* to make the load allocation ... mandatory." EPA Br. at 64-65. Indeed, under the new regulations, should any State fail to adequately "assure" implementation of nonpoint load reductions, EPA must do so itself, for it has proclaimed TMDL implementation plans and reasonable assurances to be elements of the TMDL that EPA itself must establish in the event that State action falls short. *See* AF&PA Br. at 6; 65 Fed. Reg. at 43,669.

EPA's new regulations leave no doubt that federal approval and establishment of section 303(d)(1) TMDLs for waters impaired by nonpoint sources creates much more than a mere data-generating device to assist *State* efforts under other programs. *Cf.* EPA Br. at 65; State *Amici* Br. at 20 (characterizing TMDLs as an "information-gathering exercise"). Given the practical implications of federal control of section 303(d)(1) TMDLs, EPA's interpretation of the statute cannot be reconciled with the agency's acknowledgement that it "cannot *regulate* NPS ... by *requiring* load reductions." EPA Br. at 64.

Instead, the only way to harmonize the purported information-gathering purpose of TMDLs for nonpoint sources with EPA's lack of authority over nonpoint source activities is to view any such TMDLs solely as products of section

303(d)(3). *See* 33 U.S.C. § 1313(d)(3). Such truly informational TMDLs – as expressly contemplated by the statute – are not subject to federal approval or take-over authority and therefore assure that nonpoint source land use decision-making remains solely within the States' domain, as Congress intended. *Id.*

CONCLUSION

For the foregoing reasons and for the reasons set forth our Opening Brief and in the Opening Brief and Reply Brief of Plaintiffs-Appellants, the district court's decision should be reversed.

Respectfully submitted,

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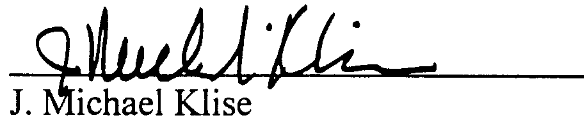
Dated: January 10, 2001

CERTIFICATE OF COMPLIANCE

I, J Michael Klise, an attorney for Intervenor-Appellants, hereby certify that the attached Reply Brief of Intervenor-Appellants is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the Brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.



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CERTIFICATE OF SERVICE

I hereby certify that on this, the 10th day of January, 2001, I caused two copies of the foregoing Reply Brief of Intervenor-Appellants to be served as on the following by first class mail, postage prepaid:

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