No. 02-1186

IN THE
SUPREME COURT OF THE UNITED STATES

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *ET AL.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN SUPPORT OF PETITION

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PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the petition, the American Forest & Paper Association ("AF&PA") and the California Forestry Association ("CFA") participated in the case below as plaintiff/appellant-intervenors. Fifteen groups participated as defendant/appellee-intervenors. Those groups are: Pacific Coast Federation of Fishermen's Associations, Golden Gate Fishermen's Association, Sierra Club, Environmental Protection Information Center, Coast Action Group, Friends of the Garcia, California Trout, Klamath Forest Alliance, Mendocino Environmental Center, Willits Environmental Center, California Wilderness Coalition, Friends of the Navarro River, South Fork Mountain Defense Committee, Northcoast Environmental Center, and San Francisco Baykeeper.

RULE 29.6 STATEMENT

AF&PA and CFA are corporate parties. Neither has a parent corporation or stock owned by a publicly traded company.

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REASONS FOR GRANTING THE PETITION

AF&PA and CFA agree with the reasons for granting the petition as articulated by the petitioners. We offer the following grounds in further support of the petition.

This case presents a question of critical importance for two major programs established under two sections of the Clean Water Act ("CWA"): the § 303(d) total maximum daily load ("TMDL") program directly at issue and the § 319 program, which requires State-based initiatives to reduce pollution from so-called "nonpoint sources" that are not subject to CWA permitting. In a very real sense, the Court's resolution of this case (or its decision not to resolve the questions presented) will determine for years to come whether land use controls to reduce nonpoint source pollution are imposed according to the will of the States or the will of the United States Environmental Protection Agency ("EPA" or "the agency").

Congress has plainly sought throughout the history of the modern CWA to reserve this power to the States rather than cede it to the federal government. Yet EPA's interpretation of its TMDL authority, to which the courts below wrongly deferred, usurps the States' role and dramatically strengthens EPA's hand in directing land use policy and the stringency of land use restrictions nationwide. Moreover, the nonpoint source TMDL obligations imposed by EPA consume millions of dollars every year that would otherwise be available to develop and implement on-the-ground pollution controls through the flexible programs that Congress established for that purpose. Thus, as further explained below, leaving the Ninth Circuit's decision in place would upset the CWA's balance of federal and State power, impose tremendous economic burdens on States and

landowners, and actually undermine the effective and efficient control of nonpoint source pollution.

I. Federally Approved or Established Nonpoint Source TMDLs Unlawfully Constrain State Programs.

A. Federal TMDLs Are Binding on State Water Quality Planning Programs.

The court below correctly recognized that TMDLs themselves establish no *directly enforceable* limit on pollutant loading from any source. *See* 291 F.3d 1123, 1140 (9th Cir. 2002). The court improperly rejected the Pronsolinos' federalism arguments, however, based on its gross misapprehension of the binding and prescriptive nature of TMDLs that are established pursuant to CWA § 303(d)(1)-(2), 33 U.S.C. § 1313(d)(1)-(2). As the Pronsolinos point out (Petition at 4), EPA's arm-twisting left no alternative for California regulators but to translate the loading limits for the Garcia River into restrictions on timber harvesting and other forestry activities. Moreover, as explained below, such federal TMDLs as a practical matter are always binding on State water quality programs.

For waters identified pursuant to CWA § 303(d)(1), States must submit TMDLs for EPA approval and, in the event of disapproval, EPA must be directly establish the TMDLs. 33 U.S.C. § 1313(d)(2). Where such "federal" TMDLs are not required – *i.e.* for all waters *not* listed pursuant to § 303(d)(1) – the CWA requires States to "estimate" TMDLs, for informational purposes, without the need for EPA "approval." *Id.* § 1313(d)(3).

Pursuant to CWA § 303(d)(2) and (e), all EPA-approved or EPA-established TMDLs must be incorporated into State "plans" for the waters at issue pursuant to the State's "continuing planning process" ("CPP"). 33 U.S.C. § 1313(d)(2) (upon EPA approval of TMDLs, or upon EPA establishment of TMDLs, State "shall incorporate them into its current plan under subsection (e) of this section"); *id.* § 1313(e) (identifying requirements for State CPPs). EPA must periodically review each State's CPP, and States must have an EPA-approved CPP to be authorized to administer the CWA permitting program for point source dischargers within their boundaries. *Id.* § 1313(e)(2).

Because federal TMDLs must be incorporated into State water quality plans – and because federal TMDLs can be modified only with further EPA review and approval – such TMDLs necessarily constrain subsequent State and local efforts to address nonpoint source pollution. *See Sierra Club v. Hankinson*, 939 F. Supp. 872, 874 (N.D. Ga. 1996) (ordering EPA to implement federally approved or established TMDLs within Georgia by reviewing and requiring "revision, modification, revocation or reissuance as necessary of Georgia's Water Quality Management Plans, ... Continuing Planning Process, ... and any Memoranda of Agreement between EPA and the State of Georgia on water quality issues") (citations omitted). These binding and inflexible targets contrast sharply with *estimated TMDLs* generated pursuant to CWA § 303(d)(3) "*for the specific purpose of developing information.*" 33 U.S.C. § 1313(d)(3) (emphasis added). Estimated TMDLs also are used in State planning, *see id.* § 1313(e)(3)(C), but for informational purposes only and with no federal "approval." Such estimated TMDLs therefore serve to inform State water quality decisions but can be modified by the State alone to account for new information, changes in the sources of

pollution over time, or evolving water quality programs and policies.

The establishment of federal TMDLs thus effectively binds the State to strive toward implementation of those particular loading limits unless and until EPA approves of different limits. Even where federal TMDLs are established for waters affected only by *nonpoint source* activities, these nonpoint source TMDLs become binding targets to be pursued by State authorities notwithstanding that the State may have had no role in their development. The State must seek to achieve such federal TMDL targets even if they contradict the State's own land use policies and nonpoint source control programs, such as previously established programs and plans developed pursuant to CWA § 319 (discussed *infra*). Any State efforts to modify federal nonpoint source TMDLs for consistency with the State's own water quality programs, conservation efforts, and land use policies may proceed only with EPA "approval" of a revised TMDL.

According to EPA, States are bound to pursue not only the *total* pollutant loading reduction mandated under a federal TMDL, but also a federally approved *allocation* of pollutant loading among sources. EPA's implementing regulations define "total maximum daily load" as the sum of "wasteload allocations" to point source dischargers and "load allocations" to nonpoint source activities and natural background. *See* 40 C.F.R. § 130.2(i) (definition of TMDL); *id.* § 130.2(g) (defining "load allocation" as "the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources"). According to the agency, EPA's approval authority – and its authority to directly establish TMDLs – extends to the establishment of these

"load allocations" among land use activities within a watershed. *See id.* § 130.7(d) (stating that all wasteload allocations, load allocations, and TMDLs established for § 303(d)(1)-listed waters must be submitted for EPA review and approval).

Such binding federally approved TMDLs, and even federally approved "allocations" among sources, may be appropriate in the context of defining load reductions to be required of federally regulated point source dischargers. As discussed below, however, this degree of EPA control fundamentally contradicts the limited federal authority established by Congress with respect to State *nonpoint source* control strategies. Instead, where nonpoint sources cause or substantially contribute to water quality impairment, Congress has specifically crafted CWA provisions to maximize State flexibility – providing federal financial assistance and technical guidance to support, but never to prescribe, State programs.

B. Congress Has Specifically Denied EPA the Authority to Dictate the Content of State Nonpoint Source Programs.

Congress defined the appropriate State and federal roles and responsibilities with respect to nonpoint source pollution control in two CWA provisions. The first provision, § 208, was enacted along with the TMDL provisions in 1972. *See* 33 U.S.C. § 1288. The second, § 319, was enacted 15 years later in 1987. *See id.* § 1329. The limited authority Congress accorded to EPA under both provisions stands in vivid contrast to the power asserted by EPA to directly establish maximum pollutant loads for nonpoint source land use activities.

In CWA § 208, the same Congress that authorized TMDLs established an extremely limited EPA role in addressing nonpoint source control. Section 208 required that State-designated organizations establish, and submit to EPA, "areawide waste treatment management plans" that would include a process to: (1) "identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution," and (2) "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F). Although § 208 authorized EPA review and approval of the specified State *process*, it did not authorize EPA review of *substantive* pollution reduction goals and control methods that would ultimately be identified. Nor did § 208 establish any mechanism – such as direct EPA action – to ensure that appropriate plans and processes would be established. Instead, Congress provided incentives for State-based initiatives through authorized federal funding. *See id.* § 1288(f).

The enactment of CWA § 319 in 1987 introduced a more aggressive approach to nonpoint sources. Yet even with this provision, Congress stopped far short of authorizing EPA to *directly prescribe* the substance of State nonpoint source control plans. Section 319 required States to submit "assessment reports": (1) listing waters in need of additional nonpoint source control, (2) identifying sources or categories of sources responsible for significant pollution in those waters, (3) describing "the process ... for identifying best management practices and measures ... to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source," and (4) describing the State and local programs for controlling nonpoint source pollution. 33 U.S.C. § 1329(a)(1). Section 319 also required the submittal of State "management

programs" that: (1) identify the best management practices to be undertaken to reduce pollution from the identified nonpoint sources, (2) identify the regulatory or nonregulatory programs to achieve implementation of those practices, and (3) provide a schedule for implementation of the program and the practices at the "earliest practicable date." *Id.* § 1329(b)(2).

Section 319 authorizes EPA to "disapprove" State assessment reports and management programs that do not meet the statutory requirements, so long as EPA does so within 180 days. *See* 33 U.S.C. § 1329(d)(1) (report or program deemed approved, unless expressly disapproved within 180 days). EPA disapproval of a *management program* (*i.e.,* the submittal that identifies nonpoint source controls) also requires notice and a three-month period for the State to submit a revised program for approval. *Id.* § 1329(d)(2). Most importantly, even if a State nonpoint source management program is "disapproved," § 319 provides no authority for EPA to directly establish a federal program and impose it on the State. Instead, in the absence of an approved *State* program, § 319 authorizes *local* public agencies or organizations to develop and submit an approvable program. *Id.* § 1329(e).

Congress's clear, consistent, and long-standing determination *not* to allow EPA to dictate nonpoint source control standards cannot be reconciled with the lower court's interpretation of § 303(d). *Compare Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000) (finding it "clear, based on the [Federal Food, Drug and Cosmetic Act's] overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products"). To the contrary, the CWA as a

whole unambiguously denies EPA the power to directly establish maximum pollutant loads for nonpoint source activities.

Sections 208 and 319 also cannot be squared with mandatory federal nonpoint source TMDLs that must be set at levels "necessary to implement ... water quality standards" *regardless of cost*. Although TMDLs must be established "at a level necessary to implement the applicable water quality standards," 33 U.S.C. § 1313(d)(1)(C), the nonpoint source statutory provisions call for pollution reduction only to the extent "feasible" (in § 208) or "practicable" (in § 319), *id.* §§ 1288(b)(2)(F), 1329(a)(1)(C). These flexible, pragmatic goals allow for due consideration of the potential burdens that land use restrictions may impose on small businesses, individuals, and local governments. The explicit provision for such considerations in both § 208 and § 319 demonstrates Congress's determination *not* to ask that States impose nonpoint source controls without regard to cost or technical feasibility – although that is precisely what the decision below ultimately demands.

II. Prescriptive Requirements for Federal Nonpoint Source TMDLs Drain Funding and Other Resources from the State-Controlled Programs That Were Intended to Govern Nonpoint Source Control.

Petitioners have accurately described the magnitude of the economic burden (for States and land owners) associated with EPA's demand for federal TMDLs for *all* impaired waters instead of only waters that need more stringent, water quality-based effluent limitations. *See* Petition at 27 (noting estimated $1 billion cost of developing more than 40,000 TMDLs over the next ten years).

Moreover, the financial burden and technical complexity of precisely calculating scientifically defensible "total maximum daily loads" for land use activities siphons funding and other resources from the more pragmatic, flexible, State-based efforts that Congress sought to promote through programs such as CWA § 319.

In November 2000 (six months after the district court ruling in this case), EPA announced new guidelines for the use of § 319 nonpoint source grant funds, recognizing for the first time "*the need to increasingly focus Section 319 grant dollars on implementing approved TMDLs....*" EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants in FY 2001*, at 4 (Nov. 21, 2000) (available at <www.epa.gov/owow/nps/Section319/fy2001.html>) (emphasis added). In this initial announcement, EPA authorized States to use roughly half of the total $238 million appropriated for the coming year for the development or implementation of federally approved nonpoint source TMDLs. *Id.* The "increasing[] focus" on funding nonpoint source TMDLs continued in fiscal year 2002, with EPA *requiring* half of the total funding, or roughly $100 million, to be used only to develop or implement approved nonpoint source TMDLs. *See* EPA, *Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003*, at 2 (Aug. 26, 2002) (available at <www.epa.gov/owow/nps/Section319/319guide03.htm>). EPA modified this approach somewhat for fiscal year 2003, allowing States to also use these funds for watershed-based initiatives affecting § 303(d)(1) listed waters that do not yet have approved TMDLs – provided that the States would later modify their plans to comply with federally approved TMDLs. *Id.* at 3.

The substantial burden of developing numeric "daily loads" and "allocations" for nonpoint source land use activities (which are by their nature intermittent, highly variable, and ill suited for measurement) certainly justifies a high level of economic assistance to the States. But the question remains whether the calculation of such pollutant limits – which arguably create only a false sense of precision – adds to, or detracts from, the process of improving nonpoint source control. Indeed, prior to the shift in focus toward nonpoint source TMDLs, EPA's § 319 funding guidance proclaimed the paramount importance of *flexibility* in State nonpoint source planning.

According to EPA's most recent prior comprehensive funding guidance: "A fundamental principle of this guidance is that States should have the flexibility to use section 319 grant funds in a manner that they determine will best implement their nonpoint source management programs effectively." EPA, *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years*, at 16 (May 1996) (available at < http://www.epa.gov/owow/nps/guide.html>). The agency declared that "EPA is committed to providing States great flexibility in determining *their own priorities and methods* for choosing and implementing watershed projects" and authorized the use of § 319 grant funds for any activities that would implement the State's nonpoint source management program. *Id.* at 18, 21 (emphasis added).

Regardless of the technical merit and utility of nonpoint source TMDLs in general, it is certain that the demand for federally approved nonpoint source TMDLs has become a burden that consumes resources otherwise available for identifying and implementing the best modern practices to reduce nonpoint source pollution. Such federal TMDLs and load allocations among sources also dramatically reduce the States' flexibility to pursue innovative, adaptive approaches and to react to changing land uses and development patterns. Notwithstanding Congress's broad authorization of funding to support *any* State projects to implement an approved nonpoint source management program, *see* 33 U.S.C. § 1329(h)(1), § 319 funding has evolved into a mechanism for financing federally approved, inflexible, *de facto* effluent limitations for land use activities. Such limitations contribute nothing to the identification and implementation of effective, on-the-ground control measures and indeed undermine the less quantitative, but more pragmatic, programs that were designed to address nonpoint sources.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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