IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-16026 and 00-16027

GUIDO A. PRONSOLINO, et al.,
Plaintiffs-Appellants,

AMERICAN FOREST AND PAPER ASS'N, et al.,
Intervenors-Appellants,

v.

FELICIA MARCUS, 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.

SUPPLEMENTAL BRIEF OF THE FEDERAL APPELLEES

The federal appellees respectfully submit this supplemental brief to address the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675 (January 9, 2001) ("SWANCC"), which was handed down after our responsive brief was filed and is

relied upon in the Reply Brief of Plaintiffs-Appellants Guido Pronsolino, et al. ("Appellants").

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A. *The SWANCC Decision*. At issue in SWANCC was the scope of the United States Army Corps of Engineers' regulatory permitting authority under Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(a). Section 404(a) authorizes the Corps to issue permits for discharges of dredged or fill material into "navigable waters," elsewhere defined in the CWA as the "waters of the United States." Id.; 33 U.S.C. 1362(7). In SWANCC, the Supreme Court held the Corps had exceeded its statutory authority by asserting regulatory jurisdiction over "nonnavigable, isolated, intrastate waters" based solely on the use of those waters as habitat for migratory birds. 121 S.Ct. at 682.

After concluding that the text of the CWA "clear[ly]" did not authorize the Corps to regulate discharges to the isolated wetlands in question on the basis of migratory bird use, the Court in SWANCC proceeded in dicta (121 S.Ct. at 683) to explain why, "even if" the statutory language were not clear, the Corps' interpretation of the CWA would not be entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Court stated that the Corps' reading of Section 404(a) "to reach an abandoned

sand and gravel pit," would result in a "significant impingement" of the States' primary authority over land and water use. Id. at 684. The Court stated that the Corps' interpretation would raise "significant constitutional questions" that should be avoided in the absence of a "clear statement" from Congress that it required that result. Id. Because of the constitutional questions, the Court noted that – even if it had not found the Corps' position to be inconsistent with the plain language of the CWA -- it would not have deferred to the Corps' reading. 121 S.Ct. at 684.

B. *SWANCC's Irrelevance to this Appeal*. Although Appellants' Reply Brief makes much of the SWANCC decision, the decision provides no support to their position in this case.

1. The holding of SWANCC was that Congress did not intend the Corps' authority under Section 404(a) to extend to nonnavigable, isolated waters within a single State, where the sole basis for asserting jurisdiction was migratory bird habitat. That holding has no bearing on the instant case, which has nothing to do with "isolated" waters. The water body at issue here, the Garcia River, is itself navigable and flows into the Pacific Ocean; it is therefore indisputably a "water of the United States" within the meaning of the CWA. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985). Appellants do not contend that addressing the pollution of the Garcia River caused by nonpoint sources is beyond

the permissible scope of Congress' power under the Commerce Clause -- they merely contend that Congress did so through provisions of the CWA other than Sections 303(d)(1) and (2). See Prons. Opening Br. 26-31 (discussing CWA sections 303(d)(3), 208, and 319). Unlike SWANCC, then, this is not a case in which the Court is faced with competing interpretations of the CWA, one of which brings certain resources or activities within the jurisdiction of the CWA and the other of which leaves them entirely to state and local jurisdiction. Appellants have acknowledged that "NPS-only" waters are subject, at least, to *other* provisions of the CWA, including Sections 208, 303(d)(3), and 319. In so doing, they have acknowledged what should be uncontroversial: that Congress has ample authority to address nonpoint source activities that pollute "waters of the United States" such as the Garcia River.

2. In their reply brief (at pp. 1, 21-22, 25), Appellants rely on the passages in SWANCC in which the Court discussed and rejected the Corps' request for Chevron deference to its interpretation of the scope of Section 404(a). Appellants contend that EPA's construction of Section 303(d) in this case likewise works a "significant impingement of the States' traditional and primary power over land and water use," Reply Br. 21-22 (quoting SWANCC), so this Court should not defer to EPA's construction and should adopt a construction of Section 303(d)

that avoids these "constitutionally troubling questions" presented by EPA's interpretation. See also Reply Br. 25.

Appellants' reliance on these passages in SWANCC is misplaced. First, as we explained in our brief (64-66), Appellants' repeated assertions that the TMDL program impinges upon State and local governments' land use planning decisions are groundless.[1] As the district court explained in rejecting this argument:

> The word "regulate" pervades plaintiffs' argument. Congress did not, they say, authorize EPA to regulate state land-use practices. The Court agrees. EPA agrees. Unlike EPA's authority to revise individual NPDES permits issued by states for individual point sources, EPA received no authority to review land-use restrictions placed (or not placed) on timber-harvesting permits by CDF or any other practice permitted for agriculture or silviculture. * * * *
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> Under the Act, California must "incorporate" the TMDL in its planning. Nothing, however, requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land. California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests. Although such steps might provoke EPA to withhold federal environmental grant money, California is free to run the risk.

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[1] It is worth noting that seven States, including California, have filed an amicus curiae brief which concluded that "including non-point sources in the TMDL process does not raise federalism concerns." Br. at 19-22. The States observed that "[b]y empowering States, this [TMDL] process actually enhances State and local control." Id. at 20.

Pronsolino v. Marcus, 91 F.Supp. 2d 1337, 1355 (N.D. Cal. 2000).

Appellants adduce no colorable constitutional objection to the TMDL program that would remove this case from the ambit of ordinary Chevron principles. The TMDL provisions of Section 303(d) are simply not comparable to Section 404(a) permitting authority at issue in SWANCC, under which the Corps can forbid or impose conditions on activity (i.e., discharges of dredged or fill material) by private parties or nonfederal governmental bodies. See 121 S.Ct. at 679-80.

With respect to nonpoint sources, TMDLs do not impose regulatory controls, but instead establish load allocations at levels necessary to implement applicable water quality standards. See Fed. Appellees' Br. 8-12. Once a TMDL is developed, the State retains the authority to determine what measures should be implemented to bring substandard waters into compliance with applicable water quality standards. See Fed. Appellees' Supplemental Excerpts at 142-45. But, as the district court noted, States are not ultimately obligated to impose any such requirements, and even though EPA may encourage implementation of TMDLs by conditioning grants, States may choose to forgo federal grant money.[2] Moreover,

[2] EPA's efforts to encourage implementation of TMDLs by conditioning grants is consistent with both the CWA and the Constitution. See Fed. Appellees'

States may choose to implement nonpoint source TMDLs through voluntary, incentive-based approaches rather than through mandatory requirements. "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)" (Aug. 8, 1997); ER-91, Ex. 7 at 5.

Because States are left with broad latitude as to what measures to implement on nonpoint sources that pollute waters of the United States, and are even free to choose not to impose any land use controls, EPA's construction of Section 303(d) does not "infringe" upon States' and localities' traditional roles in land use planning. There is, therefore, no reason to call upon any "constitutional avoidance" canons discussed in SWANCC, and no reason for the Court to depart from traditional principles of Chevron deference that ordinarily apply to agency interpretations of

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Br. at 65 n. 39.

statutes such as the CWA. See Riverside Bayview Homes, 474 U.S. at 461; Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 1525 (9th Cir. 1995).

Respectfully submitted,

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