Nos. 00-16026 and 00-16027

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**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 ASS'N, et al.,**
*Intervenors-Appellees*.

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

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# BRIEF OF INTERVENOR-APPELLEE THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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## CORPORATE DISCLOSURE STATEMENT

The Association of Metropolitan Sewerage Agencies ("AMSA") represents the interests of more than 240 municipal wastewater dischargers that provide service to the majority of the country's sewered population. AMSA is a trade association incorporated under the laws of the District of Columbia. AMSA is not publicly held and has no parent or subsidiary companies.

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## STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702, 704. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellants' notices of appeal were timely filed pursuant to Fed. R. App. P. 4(a)(1)(B). Joint Excerpts of the Record at Tab 131, 132.

## STATEMENT OF THE ISSUE

The U.S. Environmental Protection Agency ("EPA" or "the Agency") has interpreted § 303(d)(1) and § 303(d)(2) of the Clean Water Act ("CWA " or "the Act"), 33 U.S.C. § 1313(d)(1) and § 1313(d)(2), to include all sources of pollution when the Agency or a state develops lists of impaired water segments and establishes total maximum daily loads ("TMDLs") for those waters. The issue is whether EPA impermissibly includes nonpoint sources of pollution when listing such waters and establishing TMDLs for them.

## STATEMENT OF THE CASE

The Association of Metropolitan Sewerage Agencies ("AMSA") is satisfied with the Statement of the Case filed by EPA. To avoid duplication, AMSA incorporates the same by reference.

## STANDARD OF REVIEW

This Court's review of the decision below is *de novo*, governed by the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and cases interpreting it.

The leading case of Chevron, U.S.A., Inc. v. N.R.D.C. requires courts, as well as administrative agencies, to "give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837, 842-3 (1984). Chevron and its progeny also make clear that if the statute is silent or ambiguous on the disputed issue, courts must decide whether an agency's interpretation is based on a permissible construction of the statute. See id. at 843.

Nonetheless, courts must not give effect to interpretations that lead to absurd, unjust, or unintended results. In Re Pacific-Atlantic Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995) (stating "[w]e will not presume Congress intended an absurd result."). Results are absurd if they are inconsistent with the purpose of the statute, or the objectives it seeks to achieve. See, e.g., Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) (stating "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Furthermore, rather than focusing just on the word or phrase at issue, courts must read the entire statute together to determine Congressional intent. Zimmerman v. State Dept. of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999).

## SUMMARY OF ARGUMENT

The Appellants' position concerning interpretation of § 303(d) of the CWA must be rejected because it would lead to absurd results that are inconsistent with

the objective of the CWA. Removing nonpoint sources of pollution from the total maximum daily load process would allow the major contributors to water quality impairment, nonpoint sources, to avoid responsibility under § 303(d) and would frustrate this objective. By ignoring the contributions of nonpoint sources, effective TMDLs could not be established for and water quality standards would not be met in many impaired waters. Meanwhile, EPA and state regulatory agencies would impose increasingly restrictive and expensive new limitations on publicly owned treatment works ("POTWs") and other point sources, regardless of the point sources' relative contributions to the impairment of the water. Appellants' proposed regime would dramatically increase the costs incurred by POTWs to remove increasingly smaller amounts of pollutants from their discharges, often without any realistic expectation that water quality standards could be met. Such an inequitable approach would only frustrate the comprehensive, holistic program crafted by Congress to improve this nation's water quality.

## ARGUMENT

The Federal Appellees have clearly described the legal issues and precedents that should control the resolution of this case. Therefore, AMSA's brief argument will describe the inequities, impracticality, and absurdity that would flow from a reversal of the decision of the district court below.

The resolution of this case has important CWA permitting implications for point source dischargers throughout the country. TMDLs that fairly reflect the relative contributions of all sources of impairment of water segments would result in all sources taking responsibility for their contributions and reducing their loadings. They may ultimately achieve the objective of the CWA . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. See 33 U.S.C. § 1251. In contrast, failing to include nonpoint sources in the TMDL process is a prescription for failure, one which Congress most certainly did not intend when § 303(d) was enacted.

Understanding the role of POTWs in pursuing the objective of the CWA illuminates the unreasonableness of the Appellants' position. Over 16,000 publicly owned, municipal wastewater collection and treatment facilities serve approximately 190 million people, comprising 73% of the U.S. population. Intervenor-Appellee the Association of Metropolitan Sewerage Agencies' Supplemental Excerpts of Record ("ASER") at 3-4. Established in 1970, AMSA's more than 240 POTW members provide service to the majority of the country's sewered population. ASER at 23. AMSA's POTW members include point source dischargers permitted to discharge treated effluent under the CWA's National Pollutant Discharge Elimination System ("NPDES"). Approximately 80 to 85%

of AMSA's POTW members are located on impaired waters listed as "water quality limited segments" pursuant to CWA § 303(d). Id.

The efforts of AMSA's members and other point source dischargers in complying with the CWA's requirements are largely responsible for the improvements in water quality achieved over the past 28 years. As was recently recognized in the federal government's "Clean Water Action Plan," "[p]erhaps the single biggest reason for the dramatic progress in reducing water pollution is the remarkable improvement in the treatment of municipal wastewater." ASER at 29.

Such progress, however, is expensive. Local governments' wastewater investment between 1972 and 1991 totaled approximately $196 billion. ASER at 24. EPA estimated in its 1996 Clean Water Needs Survey that municipalities would need another $128 billion to fund secondary treatment, advanced treatment, combined sewer overflows, and other controls over the next 20 years. ASER at 11. EPA revised its 1996 needs estimate for sanitary sewer overflows by $71.6 billion in 1999, increasing its total needs estimate to nearly $200 billion. ASER at 24. Taking the cost of replacing aging treatment plants and collection systems into account, AMSA estimates that wastewater investment costs incurred by local governments between 1996 and 2015 will exceed $300 billion. Id.

In stark contrast to the efforts, costs, and successes of point sources, nonpoint sources are preventing this country from realizing the objective of the

CWA. Nonpoint sources of pollution, including forestry and agriculture, continue to be the leading cause of water quality impairment in this country, according to state estimates summarized in EPA's "National Water Quality Inventory" prepared pursuant to CWA § 305(b). Pollution from agriculture, primarily nonpoint source runoff from irrigated and nonirrigated cropland, rangeland and pastureland, contribute up to 70% of all water quality problems identified in those waters. ASER at 44-49.

The costs incurred by POTWs in complying with the CWA would skyrocket if this Court were to accept the Appellants' interpretation of § 303(d), excuse nonpoint sources, and force point sources alone to attempt to clean up waters impaired by both point and nonpoint sources. POTWs and their municipal ratepayers would be required to invest in increasingly stringent controls to try to clean up someone else's nonpoint source pollution . . . efforts that would yield few or no environmental benefits.

Requiring EPA and states to rely exclusively upon point sources for water quality improvements in impaired waters would prevent the attainment of water quality standards. The CWA constitutes "a comprehensive legislative attempt to 'restore and maintain the chemical, physical, and biological integrity of the nation's waters.'" U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). Congress recognized that point sources, such as POTWs, could not

achieve this objective alone. Rather, both houses of Congress noted that the goals of the Act would not be met unless nonpoint sources did their part to clean up the problems they helped create. The Senate Committee on Public Works stated: "[i]t has become clearly established that the waters of the Nation cannot be restored and their quality maintained unless the very complex and difficult problem of nonpoint sources is addressed." S. Rep. 92-414, at 39 (1971). The House Committee on Public Works concurred: "[i]f our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources." H.R. Rep. No. 92-911, at 109 (1972). Accordingly, Congress designed a multifaceted approach to attack the problem of nonpoint sources, including § 208, § 303(d), and later § 319. Because Congress realized that nonpoint sources of pollution could prevent the attainment of water quality goals, this Court should not conclude that Congress intended that which it rejected, namely to achieve clean water at the expense of point sources alone by excluding nonpoint sources from the TMDL process.

One real world example of the effects of Appellants' interpretation would require the City of Stockton, California to expend at least $70 million to comply with NPDES permit limits that attempt to improve the quality of waters impaired primarily by nonpoint sources. ASER at 54-55. The City of Stockton, an AMSA member, is involved in the development of a TMDL for the Lower San Joaquin

River in California. ASER at 53. Loadings of pollutants such as ammonia, nitrogen, phosphorous, and sediments cause dissolved oxygen ("DO") levels in the Lower San Joaquin to fall below state water quality standards and impair the beneficial use of the river in Delta waterways. ASER at 53-54. Don Dodge, Assistant Director, City of Stockton Department of Municipal Utilities estimates that the primary source of impairment of the river is nonpoint sources. Id. The City of Stockton is the largest point source on the river, but it contributes less than 15% of the oxygen depleting pollutants found in the river. Id. Addressing all sources of impairment would, according to Mr. Dodge, achieve the desired DO levels. ASER at 54-55. If nonpoint sources are removed from the San Joaquin River TMDL process as a result of this case, the entire burden for improving DO levels in the river would be imposed upon point source dischargers. The City of Stockton would be forced to install system and operational upgrades costing at least $70 million. Id. Despite the installation of such increased controls and associated costs, Mr. Dodge believes the Lower San Joaquin River would remain impaired, primarily by upstream nonpoint sources. Id.[1]

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[1]Despite such relative contributions, in 1994 the Central Valley Regional Water Quality Control Board ("CVRWQCB") issued a new NPDES permit to the city that assigned stringent effluent limits for ammonia. The limits were designed to achieve the state standards for DO in the river without considering the contributions of upstream nonpoint sources. The City of Stockton appealed this permit, relying upon modeling that demonstrated DO levels in the river would not meet applicable water quality standards even if the city's discharged effluent was

(continued...)

The scenario facing the City of Stockton is typical of the results that would flow from the implementation of the Appellants' interpretation of § 303(d). The Appellants' reading of the CWA would have municipalities throughout this country spending billions of dollars to make exponentially decreasing progress in achieving water quality standards, while nonpoint sources, the major cause of water quality impairment, do nothing. Such results are absurd and could not have been intended by Congress.

## CONCLUSION

The judgement of the district court should be affirmed.

Respectfully submitted,

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[1](...continued)
removed completely from the river. In light of such facts, the State of California State Water Resources Control Board remanded the permit to the CVRWQCB to reconsider the ammonia limits, taking into consideration, among other things, regulatory requirements and operational practices that may improve DO levels in the river, and to incorporate flexibility into the NPDES permit to accommodate future improvement in receiving water DO levels and alternatives for reducing the city's impact on DO levels. ASER at 54.

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no known related cases pending in this court.

## CERTIFICATE OF COMPLIANCE

I certify pursuant to Ninth Circuit Rule 32-1 that the attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

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LaJuana S. Wilcher

## CERTIFICATE OF SERVICE

I certify that on this 1st day of December, 2000, copies of the foregoing Brief of Intervenor-Appellee the Association of Metropolitan Sewerage Agencies were served on counsel by depositing the same, postage prepaid, in first-class U.S. Mail, addressed as follows:

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