Nos. 00-16026 and 00-16027

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

v.

FELICIA MARCUS, REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents-Appellees,

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASS'N., *at al.*,
Intervenors-Appellees.

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

RESPONSE OF INTERVENOR-APPELLEE, ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, TO PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Association of Metropolitan Sewerage Agencies ("AMSA") hereby discloses that it represents the interests of more than 270 municipal wastewater treatment agencies that provide service to the majority of the country's sewered population. AMSA is a non-profit 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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INTRODUCTION

Contrary to the assertions of the Petitioners, neither the District Court nor this Court held that 40 U.S.C. § 303(d) of the Clean Water Act ("CWA") authorizes the United States Environmental Protection Agency ("EPA") to "regulate" nonpoint sources of pollution, nor does the Panel's decision authorize EPA to "regulate" nonpoint sources of pollution. To the contrary, as held by the District Court and this Court, all that § 303(d) authorizes is EPA's inclusion and approval of the Garcia River (hereinafter sometimes referred to as "the River") on California's list of impaired waters and the establishment of a total maximum daily load ("TMDL") that identifies the reductions in sediment from nonpoint sources that are necessary for the River's recovery.

The interpretation of § 303(d) urged by the Petitioners will lead to inequitable results that would prevent the attainment of water quality standards under the CWA nationwide. Removing nonpoint sources of pollution from the TMDL process would allow major contributors to water quality impairment, nonpoint sources such as the Petitioners' timber harvesting operation, to avoid responsibility under § 303(d) and frustrate the objective of the CWA. At the same time, EPA and state regulatory agencies would impose increasingly restrictive new limitations on publicly owned treatment works ("POTWs") and other point sources, regardless of such point sources' relative contributions to water quality impairment.

The Petitioners' proposed regime would also 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 would improve or even be met because nonpoint source pollution would be allowed to continue unabated. This is an illogical approach that would only thwart the comprehensive, holistic program crafted by Congress to improve this nation's water quality.

This Court should exercise its discretion and deny the Petitioners' request for a rehearing or rehearing *en banc.*

ARGUMENT

I. THE PETITIONERS HAVE NOT DEMONSTRATED THAT A REHEARING OR REHEARING *EN BANC* IS WARRANTED.

This Court's decision to grant or deny the Petitioners' petition for rehearing or rehearing *en banc* is discretionary. Fed.R.App.P. 35. An *en banc* hearing or rehearing is "not favored and ordinarily will not be ordered." Fed.R.App.P. 35(a); Gilliard v. Oswald, 557 F.2d 359, 359 (2d. Cir. 1977). Courts of appeal are to "function principally through divisions of three judges, and *en banc* courts are:

> . . . **the exception, not the rule**. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit."

Church of Scientology of California v. Foley, 640 F.2d 1335, 1339, 1340-1341 (D.C. Cir. 1981) (emphasis added). *En banc* hearings generally engage the attention of every active judge, and consideration of a case *en banc* "drains judicial resources while burdening the litigants with added expense and delay." Id. at 1342.[1]\

The grounds for granting a rehearing *en banc* are set forth in Fed.R.App.P. 35 as follows: 1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or 2) the proceeding involves a question of exceptional importance. Ninth Circuit Rule 35-1 further allows *en banc* determinations when an opinion of the Panel directly conflicts with an existing opinion by another court of appeals. Fed.R.App.P. 40 allows for a panel rehearing when the Court has "overlooked or misapprehended" a point of law or fact.

This Court is familiar with the facts and law governing this case. EPA interprets, and has for many years interpreted, § 303(d)(1) and § 303(d)(2) of the CWA to include both point and nonpoint sources of pollution, when it or a State develops lists of impaired water segments and establishes TMDLs for those waters. In both the District Court and this Court, however, the Petitioners have challenged EPA's authority under § 303(d) of the CWA to apply these identification and TMDL allocations to the Garcia

1 In the Ninth Circuit, the *en banc* court shall consist of the Chief Judge and 10 additional judges to be drawn by a lot of active judges of the Ninth Circuit Court of Appeals. 9th Cir. Rule 35-3.

River, the river along which the Petitioners own property, in an effort to avoid regulation by the State of California for their extensive contribution of nonpoint source pollution into the Garcia River. In both the District Court and this Court, this challenge has been rejected.

The Petitioners have done nothing more than rehash their arguments previously made before the District Court and this Court, and they have failed to establish that the exceptional request for a rehearing or rehearing *en banc* is warranted in this case. The Panel did not overlook or misapprehend any point of law or fact. The case law cited by the Petitioners actually supports the position of AMSA and EPA, and a rehearing *en banc* is clearly not necessary to secure or maintain uniformity of the Court's decisions, in either the Ninth Circuit or any other Circuit. Moreover, the Petitioners have failed to demonstrate any individual injustices or mistakes in the previous decisions determining that a TMDL should be set for the Garcia River and that the State of California could incorporate its provisions into a State-issued forestry permit in an effort to improve water quality standards. The Petitioners' petition for rehearing or rehearing *en banc* should be denied.

II. THE COURT'S DECISION IS CONSISTENT WITH PRECEDENTS FROM THE NINTH CIRCUIT OR OTHER UNITED STATES COURTS OF APPEALS.

A. Ninth Circuit.

Contrary to the assertions of the Petitioners, case law in the Ninth Circuit is in accord with the Panel's interpretation of § 303(d) in this case. The Ninth Circuit in Alaska Ctr. For the Env't. v. Browner, 20 F.3d 981, 985 (9th Cir. 1994) stated that "Congress and EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters **impacted by nonpoint source pollution**." (emphasis added). In so doing, the Ninth Circuit affirmed the decision of the District Court in Alaska Center For the Env't. v. Reilly, 762 F.Supp. 1422, 1424 (W.D.Wash. 1991) which stated that TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for and are evaluated in conjunction with pollution from other nonpoint sources. Similarly, the Ninth Circuit in Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 1520 (9th Cir. 1995), held that "a TMDL represents the cumulative total of all . . . loading attributed to nonpoint sources, natural background sources, and . . . the total load allocated to individual point sources."

The Petitioners claim that the Panel's decision is "irreconcilable with prior Ninth Circuit precedents," citing Oregon Natural Res. Council v. U.S. Forest Service, 834

F.2d 842 (9th Cir. 1987) and Oregon Natural Desert Ass'n. v. Dombeck, 172 F.3d 1092 (9th Cir. 1998). This assertion is incorrect. A reading of these cases establishes that not only is the Panel's decision consistent with each of these cases, but also that these cases, in fact, support the Panel's decision in this case.

In the case at hand, the Panel was required to rule specifically on an issue of first impression, not only in the Ninth Circuit, but in any Circuit. Neither Oregon Natural Res. Council nor Oregon Natural Desert Ass'n. address the precise issue in this case, and the holdings in those cases are distinguishable from the present case. In Oregon Natural Res. Council, the Court addressed whether an environmental group could use the CWA's "citizen suit provision" to enjoin a logging operation that caused nonpoint source pollution. However, the CWA's "citizen suit provision" allows a citizen to sue only for the violation of an effluent limitation under § 301 of the CWA. Section 301, unlike § 303(d), applies, on its face, only to point sources. Accordingly, the Court ruled that such a suit was inappropriate. Id. at 850.

Similarly, in Oregon Natural Desert Ass'n., the Court addressed whether the term "discharge" used in § 401 of the CWA includes releases from nonpoint sources. The Court held that, on its face, § 401 regulates point sources only. Id. at 1097. There is no such limitation found in § 303(d). Moreover, the Court held that § 303(d) "does not itself **regulate** nonpoint source pollution." Id. at 1087 (emphasis added). Because of

this language, the Petitioners assert that this holding is irreconcilable with the Panel's decision.

The Petitioners continue to fail to recognize that EPA has never taken the position in this case that § 303(d) authorizes it to "regulate" nonpoint sources of pollution, nor does the Panel's decision authorize EPA to "regulate" nonpoint sources of pollution. To the contrary, as determined by the Panel, all that § 303(d) authorizes is EPA's inclusion and approval of the Garcia River on California's list of impaired waters and the establishment of a TMDL that identifies the reductions in sediment from nonpoint sources that are necessary for the River's recovery.

It is then up to the State of California to regulate these nonpoint sources and implement the necessary reductions. *See, e.g.,* Sierra Club v. Meiburg, 2002 WL 1426554 (2002). That is precisely what the California Department of Forestry did in this case by incorporating these reductions into the timber harvesting permits granted to the Pronsolinos. The Panel's decision is in accord with precedent in the Ninth Circuit. The Petitioners' petition for a rehearing or rehearing *en banc* should be denied.

B. Other U.S. Circuit Courts of Appeal.

The Petitioners claim that the Ninth Circuit in Oregon Natural Desert Ass'n., the Tenth Circuit in American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001) and the Fourth Circuit in Appalachian Power Company v. Train, 545 F.2d 1351 (4th Cir.

1976) held that EPA does not have the authority to "regulate" nonpoint polluters under § 303(d). Again, however, EPA has never taken the position in this case that § 303(d) authorizes it to "regulate" nonpoint sources of pollution, nor does the Panel's decision authorize EPA to "regulate" nonpoint sources of pollution.

The Tenth Circuit in American Wildlands, just like the Panel in this case, specifically stated that § 303(d) requires each state to identify all of the waters within its borders not meeting water quality standards and establish a maximum TMDL for those waters. Citing the Ninth Circuit's Dioxin, *supra*, the Court went on to further state that a TMDL "defines the specified maximum amount of a pollutant which can be discharged into a body of water **from all sources combined**." Id. at 1194 (emphasis added). The Panel's decision is in complete accord with the Tenth Circuit's decision in American Wildlands.

The Petitioners claim that Panel's opinion is "incompatible" with the recent decision of the Eleventh Circuit in Sierra Club v. Meiburg, 2002 WL 1426554 (2002) [publication page references are not yet available for this case, and a copy has been attached as Appendix A for the Court's convenience]. Again, the Petitioners are incorrect. In fact, just as in this case, the Eleventh Circuit explained that TMDLs must be established for "**every waterbody** within the state for which ordinary technology-based point-source limits will not do enough to achieve the necessary level of water

quality." Id. at 4 (emphasis added).

The Court further explained:

> Each body of water on the list is known as a "water quality limited segment" . . . , *see* 40 C.F.R. § 130.2(j), and the state must set a TMDL for **every pollutant** in each limited segment (citation omitted).

Id. at 4 (emphasis added). As should be apparent, the Court stated, "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.'" Id. at 4. Finally, the Eleventh Circuit in Sierra Club stated that States, not the EPA, have the "primary authority and responsibility" for issuing permits and controlling nonpoint sources in the States, and States have a duty to compile § 303(d) lists and "establish TMDLs for each waterbody on the list." Id. at 5.

Just as they have done throughout this case, the Petitioners have taken certain, isolated language from each of these cases out of context in an effort to justify their self-serving interpretation of the CWA. The Panel's decision is in complete accord with the Fourth Circuit, Tenth Circuit and Eleventh Circuit cases cited by the Petitioners. The Petitioners' petition for rehearing or rehearing *en banc* should be denied.

III. THE COURT'S DECISION DOES NOT CONFLICT WITH THE PLAIN TEXT, STRUCTURE AND LEGISLATIVE HISTORY OF THE CWA.

The Petitioners base much of their petition on assertions that the Panel's opinion conflicts with the "plain text, structure and legislative history" of the CWA. (Petitioners' Petition for Rehearing or Rehearing *En Banc*, pp. 7-12). This is not a basis for granting a rehearing under Fed.R.App.P. 40 or a rehearing *en banc* under either Fed.R.App.P. 35 or Ninth Circuit Rule 35-1.

The Petitioners assert that the Court's "sweeping opinion will expand dramatically" the reach of the CWA. Quite the contrary, the Court's opinion does nothing more than affirm EPA's long-standing interpretation of the text, structure, legislative history and, more importantly, the fundamental goal of the CWA – controlling water pollution, from whatever source, in the nation's waters.

The Petitioners concede in their petition that in California alone, EPA estimates that fifty-four percent (54%) of California's impaired waterways are polluted solely by nonpoint sources. (Petitioners' Petition for Rehearing or Rehearing *En Banc*, p. 3). Nationwide, nonpoint sources of pollution, including forestry and agriculture, continue to be the leading cause of water quality impairment in this country. Pollution from agriculture, primarily nonpoint source runoff from cropland, rangeland and pastureland, contribute up to seventy percent (70%) of all water quality problems identified in the

nation's waters. (AMSA's Supplemental Excerpts of Record, pp. 3-4). The Garcia River is a spawning ground and habitat for salmon and other cold-water fish, yet excessive sedimentation from nonpoint sources, such as timber harvesting operations, has caused the River to exceed California's water quality standards.

In spite of these facts, the Petitioners object to EPA's inclusion and approval of the Garcia River on California's list of impaired waters and the establishment of a TMDL, pursuant to § 303(d) of the CWA, that identifies the reductions in sedimentation from nonpoint sources that are necessary for the Garcia River's recovery. The Petitioners contend that Congress's use of the terms "effluent limitations" and "daily load" evinces a clear intent to exclude nonpoint sources from § 303(d) of the CWA.

The Petitioners are again asking this Court to ignore EPA's long-standing interpretation of the CWA and write into the statute an exclusion from considering nonpoint sources when seeking to identify the remaining causes of water quality impairment, thereby limiting §303(d) solely to point sources of pollution. Such an interpretation would preclude EPA from listing necessary reductions from nonpoint sources of pollution, such as the Petitioners' timber harvesting operations, through the establishment of TMDLs and totally frustrate the comprehensive, holistic program crafted by Congress to improve the nation's water quality.

Section 303(d) requires each state to identify and prioritize waters where

technology-based controls are inadequate to attain water quality standards:

> 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 States shall establish a priority ranking of such waters, taking into account the severity of the pollution and the uses to be made of such waters.

A reading of the CWA, as a whole, and § 303(d) specifically, the regulations promulgated by EPA, and the legislative history of the CWA clearly evinces Congress's intent to authorize the States or EPA to identify and establish TMDLs for waters where technology-based controls are inadequate to implement water quality standards and to identify **all** sources of pollution in calculating TMDLs.

The EPA regulations pertinent to § 303(d)(1) lists and TMDLs focus on the attainment of water quality standards, whatever the source of any pollution. *See,* 40 C.F.R §§ 130.2, 130.3, 130.6 and 130.7. As determined by this Court, these regulations concerning § 303(d)(1) lists and TMDLs apply regardless of whether waters receive pollution from point sources only, nonpoint sources only, or a combination of point and nonpoint sources. In the House Committee Report on the bill that introduced § 303(d) into the 1972 Amendments to the CWA, Congress made it clear that point source controls alone are inadequate to implement water quality standards for water. Oliver A. Houck, TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act, 27 Envtl. L. Rep. 10329, 10337, n. 100 (1997).

Clearly, the structure of the CWA and § 303(d), the governing regulations and the CWA's legislative history establish that Congress intended that TMDL calculations be performed for all waters, regardless of the source of impairment, and did not intend, as the Petitioners would have this Court believe, to exclude nonpoint source impaired waters from the § 303(d) list. In short, it is clear that Congress intended TMDLs to account for nonpoint sources. EPA's interpretation, the District Court's opinion and this Court's opinion reflect this plain reading and interpretation of the CWA.

In any event, what the Petitioners fail to recognize or even discuss in their petition is that EPA's statutory interpretation was, and remains, entitled to deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 104 S.Ct. 2278, 81 L.Ed.2d 694 (1984). Deference under Chevron applies if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation was promulgated in the exercise of that authority." United States v. Mead, 533 U.S.218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). If Chevron deference applies, EPA's interpretation is entitled to deference as long as it is "reasonably consistent" with the statute. Mead, at 229.

It is uncontroverted that EPA was delegated the authority to make rules under the CWA and that EPA's interpretation of those rules in this case was promulgated in the exercise of that authority. The Panel was not required to conclude that EPA's

construction of its rules in this case "was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Chevron, at 843. Instead, as declared by the Ninth Circuit in Dioxin, *supra*, at 1525, "[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 the Congress." As correctly determined by the Panel, EPA's interpretation is entitled to Chevron deference.

At the very least, EPA's interpretation is entitled to "substantial deference" under Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed.2d 124 (1944). Under Skidmore, an agency's position is entitled to deference according to its persuasiveness based on the following factors: the agency's expertise, care, consistency, and formality, as well as the logic of the agency's position. Id. at 228. Based on these factors, the Panel concluded that even if Chevron deference is not applicable, EPA's interpretation should be given substantial deference under these factors set forth in Skidmore. The Petitioners' petition for rehearing should be denied.

CONCLUSION

Requiring EPA and States to rely exclusively upon point source controls to achieve water quality improvements in impaired waters would, quite simply, 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, 106 S.Ct., 88 L.Ed.2d 419 455 (1985). Congress recognized that point sources, such as POTWs, could not achieve this objective alone. Because Congress recognized that nonpoint sources of pollution could prevent the attainment of water quality goals, this Court should not conclude, as the Petitioners continue to request, that Congress intended to achieve clean water at the expense of point sources by excluding nonpoint sources, which continue to be the primary remaining, largely uncontrolled source of water pollution, from the TMDL process.

The Petitioners' reading of the CWA promotes an inequitable system wherein municipalities and other point sources would spend billions of dollars to make exponentially decreasing progress in achieving water quality standards, while nonpoint sources like the Petitioners, continue to cause significant water quality impairment across the country.

For the foregoing reasons, AMSA respectfully requests the Court to deny the Petitioners' petition for rehearing or rehearing *en banc.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifty (50) true and correct copies of the foregoing RESPONSE OF INTERVENOR-APPELLEE, ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, TO PETITION FOR REHEARING OR REHEARING *EN BANC* was this ___ day of August served by U. S. Mail, first class, postage prepaid upon Clerk, United States Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California 94119-3939 and that one (1) true and correct copy of the foregoing RESPONSE OF INTERVENOR-APPELLEE, ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, TO PETITION FOR REHEARING OR REHEARING *EN BANC* has been served by U.S. Mail on the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume requirements of Fed.R.App.P. 40 and Ninth Circuit Rule 40-1 in that it contains 3,419 words according to a report generated by the word processing system used to produce this brief.

This ___ day of August, 2001.

_____

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