No. 02-1186

In the Supreme Court of the United States

GUIDO A. PRONSOLINO, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

GREER S. GOLDMAN
RONALD M. SPRITZER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 303(d)(1)(A) of the Clean Water Act requires each State to identify those waters within its boundaries for which "effluent limitations," which are technology-based restrictions on point-source discharges of pollutants, "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. 1313(d)(1)(A). Section 303(d)(1)(C) further requires States to develop informational tools, known as "total maximum daily loads" (TMDLs), for pollutants of those waters. 33 U.S.C. 1313(d)(1)(C). The question presented is:

Whether the court of appeals properly affirmed the Environmental Protection Agency's determination that Section 303(d)'s requirements apply to waters that are not presently subject to point source discharges of pollutants, and are therefore not presently subject to effluent limitations, but nevertheless fail to satisfy the applicable water quality standards owing to pollution from nonpoint sources.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 291 F.3d 1123. The opinion of the district court (Pet. App. 33a-71a) is reported at 91 F. Supp. 2d 1337.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on October 9, 2002 (Pet. App. 32a). On December 20, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 6, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, landowners and agricultural and timber trade interests, sued the Environmental Protection Agency (EPA), alleging that EPA had exceeded its authority under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, in establishing a "total maximum daily load" (TMDL) for the Garcia River in Northern California. TMDLs are primarily "informational tools" that identify the maximum amount of a pollutant that can be added to a water body (its loading capacity) without exceeding a water quality standard for that pollutant. See 33 U.S.C. 1313(d); Pet. App. 9a. The district court rejected petitioners' challenge, *id.* at 33a-71a, and the court of appeals affirmed that decision, *id.* at 1a-31a.

1. The CWA is a complex water pollution control regime established through multiple congressional enactments. It aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The statutory scheme employs two overarching strategies to achieve that goal: (1) a "water quality-based approach," originating in the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, that identifies water quality standards for specific bodies of water; and (2) a "technology-based approach," originating in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, that imposes effluent limitations on specific categories of "point sources." Pet. App. 4a-5a.

The States are generally responsible for adopting water quality standards, which define the water quality goals of a water body without regard to the source of potential pollutants. See 33 U.S.C. 1313. A State formulates a water quality standard by identifying the water body's intended uses and specifying criteria—

which can be numeric or narrative—necessary to protect the designated uses. 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(b) and (f), 131.6(a) and (c), 131.10, 131.11. Although the CWA requires the States to develop water quality standards, it does not make them directly enforceable as a matter of federal law. Instead, the CWA contains provisions designed to achieve those standards through mechanisms, such as effluent limitations, that restrict actual discharges.

The federal government is generally responsible for developing effluent limitations guidelines and establishing effluent limitations, which impose specific technology-based pollution control requirements for discrete "point" sources of pollutant discharges. See 33 U.S.C. 1311, 1314(b), 1316(b)(1)(B). The federal and state governments apply those effluent limitations to particular point sources through a federal permitting program known as the National Pollutant Discharge Elimination System (NPDES) or through comparable state permitting programs. See 33 U.S.C. 1311(a), (b)(1)(A), (B) and (b)(2), 1314, 1342(a) and (b). See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-121, 126-129 (1977).

The CWA envisions that the state-prescribed water quality standards will be implemented through effluent limitations or, if necessary, through other appropriate means. To that end, Section 303(d)(1)(A) of the CWA requires each State to identify those waters for which effluent limitations are inadequate to attain the water quality standards, specifically stating:

> 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 standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. 1313(d)(1)(A). The State identifies its substandard waters, which are known as "water quality-limited segments" (WQLSs), and compiles them on a "303(d)(1) list." See 40 C.F.R. 130.7(b). For those listed waters, the States are to establish "the total maximum daily load" for each pollutant that is present in excess of the prescribed water quality standard. 33 U.S.C. 1313(d)(1)(C).

The TMDL is established at the "level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. 1313(d)(1)(C). Section 303(d)(2) further provides that EPA shall review, and approve or disapprove, each State's 303(d)(1) list and TMDLs. 33 U.S.C. 1313(d)(2). If EPA disapproves a State's list or TMDL, EPA must prescribe an appropriate list or TMDL. 33 U.S.C. 1313(d)(2).

Although TMDLs play an important informational role in the CWA's regulatory scheme, they are not regulations, and they do not impose legal obligations or prohibitions on polluters. Rather, TMDLs identify the reductions in the overall loading of a pollutant in a designated segment of substandard water that are necessary to bring that segment into compliance with a water quality standard, thereby allowing "the states to proceed from the identification of waters requiring additional planning to the required plans." Pet. App.

9a, 68a-69a. "TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality." *Id.* at 9a.

When a TMDL identifies necessary reductions in pollutant loading from point sources, such reductions are achieved through restrictions set out in the NPDES permit or state permit for each point source. 33 U.S.C. 1311(a), 1362(12) and (14); 40 C.F.R. 122.44(d)(1)(vii)(B). But when a TMDL identifies necessary reductions in pollutant loadings from nonpoint sources, such reductions may be implemented only under state law, because the CWA does not have a permit program for, or otherwise regulate pollutant loadings from, nonpoint sources. See *NRDC* v. *EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). EPA has no authority to enforce TMDL pollutant-loading reductions against nonpoint sources or to require a State to do so. EPA may, however, disburse funds to the States to assist their implementation of nonpoint source management programs, including the development of best management practices to control non-point source pollution. See 33 U.S.C. 1329(h); *NRDC*, 915 F.2d at 1318.

2. In 1992, California submitted its 303(d)(1) list of impaired waters to EPA. EPA partially disapproved the list because the State did not list 17 impaired northern coast rivers, including the Garcia River. EPA established a new list for California, adding those water bodies. California's subsequent lists included those rivers, but the State did not develop TMDLs for them. Pet. App. 9a-10a. After EPA was sued on account of the slow pace of TMDL development for northern California, the agency entered into a consent decree in *Pacific Coast Federation of Fishermen's Ass'ns* v.

Coast Action Group, No. 95-4474 (N.D. Cal. filed Mar. 10, 1997), requiring the agency to guarantee that TMDLs would be developed for the northern coast rivers. Pet. App. 10a.

The State failed to submit a final TMDL for the Garcia River by the consent decree deadline, and EPA established its Garcia River TMDL. Pet. App. 10a. EPA's TMDL calculated a maximum sediment load at an average of 552 tons per square mile per year and allocated that total among various categories of nonpoint sources, including mass wasting (landsliding) associated with roads, mass wasting from timber harvesting, and erosion from road surfaces. *Ibid.*

3. In 1998, the Pronsolinos applied to the California Department of Forestry (CDF) for a permit to harvest timber on their land in the Garcia River watershed. Pet. App. 10a. Under state law, CDF is charged with ensuring that timber harvesting does not have a significant effect on the environment. See, *e.g.*, Cal. Code Regs. tit. 14, §§ 898.1(c)(1), 916.3 (2003). CDF issued a permit to the Pronsolinos containing provisions designed to implement the Garcia River TMDL by reducing sediment loads associated with road building and maintenance, tree removal, and other timber harvesting activities. Pet. App. 11a n.6. Rather than objecting to those conditions during the state permitting process, the Pronsolinos and other petitioners filed this suit, claiming that EPA lacked authority to list the Garcia River under Section 303(d)(1) and to establish TMDLs on rivers polluted only by nonpoint sources. *Id.* at 11a-12a.

On cross-motions for summary judgment, the district court ruled that Sections 303(d)(1)(A) and 303(d)(1)(C) required listing of the Garcia River and establishment of a TMDL because that river did not satisfy the appli-

cable water quality standard. The court determined that the Garcia River was subject to those requirements regardless of whether the river was polluted by point sources subject to effluent limitations or by only nonpoint sources. Pet. App. 70a. The court concluded:

> For every substandard navigable river or water, Congress sought a determination whether the central innovation of the 1972 Act—technology driven limits on effluent—would be sufficient to achieve compliance. If not, the river or water was required to go on a list of unfinished business and a TMDL calculation was required.

Ibid. The district court rejected the plaintiffs' claim that the Garcia River TMDL trenched on state authority, observing that the CWA "conferred a large degree of discretion on the states in how and to what extent to implement the TMDLs for nonpoint sources." *Id.* at 71a.

The court of appeals affirmed the district court's decision. The court of appeals noted that, regardless of the degree of deference owed to EPA's interpretation, the government's construction is "more than sufficiently supported by the statutory materials." Pet. App. 20a. The court concluded that the language of Section 303(d)(1), particularly when viewed in context, compels the conclusion that a Section 303(d)(1) list must include all substandard waters, regardless of whether they are subject to point source pollution. *Id.* at 20a-24a. The court noted that Section 303(d) "is structurally part of a set of provisions governing an interrelated goal-setting, information-gathering, and planning process that, unlike many other aspects of the CWA, applies without regard to the source of pollution." *Id.* at 26a. "Looking at the statute as a whole," the court

concluded that "EPA's interpretation of § 303(d) is not only entirely reasonable but considerably more convincing than the one offered by [petitioners] in this case." *Id.* at 28a-29a.

The court also rejected the claim that EPA's establishment of TMDLs for waters impaired solely by nonpoint sources constituted regulation of land use. The Garcia River TMDL, the court observed, identifies "the maximum load of pollutants that can enter the Garcia River from certain broad categories of nonpoint sources if the river is to attain water quality standards," but it does not dictate the measures the State should take to implement the TMDL. Pet. App. 29a. The TMDL is an "informational tool" to assist the State in creating its plan to implement its water quality standards, and not a regulation of private activity. *Id.* at 30a. "California chose both *if* and *how* it would implement the Garcia River TMDL." *Ibid.* Accordingly, the court held that EPA did not exceed its authority in identifying the Garcia River pursuant to Section 303(d)(1) and establishing the Garcia River TMDL. *Ibid.*

ARGUMENT

The court of appeals correctly held that EPA has authority, under Section 303(d) of the CWA, to establish a TMDL for the Garcia River, because the river does not satisfy the State of California's water quality standards. Pet. App. 31a. That decision does not conflict with any decision of this Court or another court of appeals and does not present an issue otherwise warranting this Court's review.

1. Petitioners contend that the court of appeals' decision "conflicts with this Court's precedents barring deference to an agency's statutory construction where the textual meaning is clear." Pet. 7. Petitioners

further assert that "the Ninth Circuit impermissibly determined that it must defer to EPA before analyzing the meaning of the statute." *Ibid.* That contention is incorrect. The Court did discuss, at the outset of its legal analysis, the general principles of deference that would govern the case, but it did not conclude on the basis of that discussion that EPA's interpretation should be upheld. See Pet. App. 12a-20a. Rather, after outlining those principles and identifying where EPA had articulated its administrative interpretation, the court then proceeded to construe Section 303(d) through the traditional tools of statutory interpretation. It comprehensively reviewed the language and purpose of the specific statutory provisions at issue, the statutory scheme as a whole, and the relevant legislative history. Pet. App. 20a-29a. The court concluded, on the basis of those materials, that "the CWA is best read to include in the § 303(d)(1) listing and TMDLs requirements waters impaired only by nonpoint sources of pollution." *Id.* at 31a.

"In the end," the court concluded "it does not much matter in this case whether we review the EPA's position through the *Chevron* or *Skidmore/Mead* prism," because EPA's construction is "more than sufficiently supported by the statutory materials." Pet. App. 20a. The court ultimately relied on deference principles only as an alternative or supplemental rationale, stating:

> Moreover, to the extent the statute is ambiguous —which is not very much—the substantial deference we owe the EPA's interpretation, under either *Chevron* or *Skidmore*, requires that we uphold the agency's more than reasonable interpretation.

Id. at 31a. Accordingly, petitioners' contention that the

court improperly deferred to EPA's construction is without merit.

Petitioners further contend (Pet. 8-16) that EPA's construction of Section 303(d) is contrary to the statute's text. The court of appeals considered and correctly rejected petitioners' arguments. Petitioners' central contention is that, when Congress directed each State to "identify those waters within its boundaries for which the [CWA's] effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters," 33 U.S.C. 1313(d)(1)(A), it meant that each State was to examine only those waters that are currently polluted by point sources subject to effluent limitations. See Pet. 8. As both courts below recognized, Congress instead directed each State to examine all waters within its boundaries to determine whether the CWA's effluent limitation program was sufficient in each individual case to achieve compliance with the applicable water quality standards. Pet. App. 21a-22a, 70a.

As the courts below recognized, the CWA's effluent limitations "are not stringent enough" to implement the water quality standards for a polluted water body if, as in the case of the Garcia River, those limitations do nothing to achieve the CWA's goal of attaining the applicable water quality standards. See Pet. App. 21a-22a. That common-sense understanding of Section 303(d)(1)'s text is consistent with "its statutory context," which envisions that a State will identify the navigable waters within its boundaries and then exclude those waters that will attain the applicable water quality standards through application of effluent limitations, "leaving all those waters for which that technology will not 'implement any water quality

standard applicable to such waters.'" *Id.* at 22a (quoting 33 U.S.C. 1313(d)(1)(A)); see *id.* at 52a-53a.[1]

Petitioners' "odd reading of the statute" is inconsistent with the CWA's statutory scheme, taken as a whole. Pet. App. 22a, 25a-29a. The CWA is designed to achieve "the eventual attainment of state-defined water quality standards," which "do not depend in any way upon the source of pollution." *Id.* at 25a. As the court of appeals observed:

> Nothing in the statutory structure—or purpose—suggests that Congress meant to distinguish, as to § 303(d)(1) lists and TMDLs, between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution. Such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source had been added or removed, and to adjust the § 303(d)(1) list and establish TMDLs accordingly. There is no statutory basis for con-

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[1] Had Congress "intended TMDLs to apply only to waters impaired by point sources" (Pet. 14), it could have said precisely that. For example, Congress made clear that Section 304(*l*)(1)(B) of the CWA applies only to waters impaired entirely or substantially by toxic pollutants discharged from point sources. See 33 U.S.C. 1314(*l*)(1)(B) (requiring States to submit to EPA "a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially *to discharges from point sources* of any toxic pollutants listed pursuant to section 1317(a) of this title") (emphasis added). Section 303(d) contains no such limiting language, which indicates that no such limitation was intended. See *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 337 (1994).

> cluding that Congress intended such an irrational regime.

Id. at 28a. Indeed, the CWA contains provisions encouraging States to develop programs to identify and manage nonpoint source pollution. See 33 U.S.C. 1288, 1329. As the court of appeals recognized, the development of TMDLs provides the States with crucial information for addressing nonpoint source pollution under state law. Pet. App. 29a-31a. See pp. 13-15, *infra*.[2]

Petitioners' further claim (Pet. 16-18) that EPA's construction is "unreasonable" is without merit. The court of appeals specifically rejected petitioners' contention that EPA "has not consistently interpreted the statute." Pet. App. 17a. The court of appeals correctly pointed out that the "first regulations promulgated after the enactment of the CWA in 1972 quite clearly required the identification on § 303(d)(1) lists of waters polluted only by nonpoint sources." *Ibid.*; see *id.* at 17a-18a. Since that time, "the agency has consistently interpreted the provisions at issue." *Id.* at 19a-20a. See *id.* at 19a, 67a-68a & n.17.

2. Petitioners incorrectly claim (Pet. 19-24) that the ruling below "conflicts with relevant decisions of this Court." To the contrary, this Court has never had any occasion to address whether Section 303(d)'s listing and

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[2] Petitioners cite legislative history (Pet. 14) stating that, when effluent limitations prove inadequate to implement the water quality standards, point sources may be required to meet more stringent control requirements. As the court of appeals properly recognized, that legislative history in no way suggests that Congress intended that only waters polluted by point sources would be subject to the TMDL process. Pet. App. 29a. Cf. *Moskal* v. *United States*, 498 U.S. 103, 111 (1990); *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990); *United States* v. *Turkette*, 452 U.S. 576, 591 (1981).

TMDL requirements apply to waters polluted solely by nonpoint sources. Indeed, as petitioners appear to concede, the issue is one of first impression that has produced no conflict among the courts of appeals.

Petitioners predicate their claim of a conflict on general statements from this Court's decisions in *EPA* v. *California*, 426 U.S. 200, 204-205 & n.12 (1976), and *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700, 712-713 (1994), that merely observe that water quality standards may provide a basis for additional point source controls. See Pet. 19-20. Those decisions do not suggest, much less hold, that water quality standards or TMDLs serve only that purpose. Indeed, decisions of this Court that petitioners do not cite recognize that the CWA has a considerably broader scope than petitioners acknowledge. See, *e.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 99-103 (1992).

There is no merit in petitioners' further contention (Pet. 21) that the court of appeals' decision is inconsistent with statements of this Court recognizing the States' preeminent role in controlling nonpoint source pollution. The court of appeals recognized that the CWA preserves the States' primary responsibility for controlling nonpoint sources. See Pet. App. 5a, 9a, 29a-30a. There is also no merit to petitioners' suggestions (Pet. 22-24) that the court of appeals interpreted Section 303(d) as authorizing EPA to supplant state regulation of land use and that the court's decision is, for that reason, in contravention of *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). EPA's TMDL for the Garcia River contained no site-specific prescriptions. Instead, it identified broad categories of controllable sediment sources (*e.g.*, mass wasting from roads) and

calculated for each category a sediment allocation and target reduction, leaving to California the determination of what, if any, pollution control measures are appropriate. See Pet. App. 29a-30a, 38a, 69a. In short, EPA's issuance of the TMDL in no way impinged on California's sovereignty. See *id.* at 29a-30a.

To the contrary, the TMDL program reflects the "partnership between the States and the Federal Government" that underlies the CWA as a whole. See *Arkansas*, 503 U.S. at 101. As the State of California noted in support of EPA's position in this case, the CWA's TMDL program "provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power. By empowering States, this process actually enhances state and local control." Cal. Dist. Ct. Amicus Br. 9-10 (filed Feb. 18, 2000). EPA did not engage in any "strong-arm behavior" (Pet. 24) requiring California to implement the TMDL. Indeed, the CWA's only mechanism for encouraging State implementation of nonpoint source loading reductions identified in TMDLs is through the constitutionally permissible action of providing grants under Section 319, 33 U.S.C. 1329, to assist States in controlling nonpoint source pollution. Pet. App. 5a, 30a. See *New York* v. *United States*, 505 U.S. 144, 167 (1992).

3. Petitioners contend (Pet. 25-28) that this case presents a matter of such exceptional importance that it warrants review by this Court, even though no other court of appeals has ruled on the question presented. That contention, which rests on a vast overstatement of the significance of this case, is without merit.

First, petitioners are wrong in characterizing the TMDL program as blurring the line between federal and state authority and posing impermissible burdens

on the States. See Pet. 26-28. Indeed, a group of seven States, including California, filed an amicus curiae brief in the court of appeals supporting EPA's construction, stating:

> [T]he "TMDL" program * * * is the most important federal program currently in place to assist the States in addressing water pollution caused by non-point sources. In California, like other States, approximately half of the impaired rivers, lakes and other waters are exclusively polluted by non-point sources * * *. While the States have primary responsibility for regulating those who are polluting our waters, the assistance of the federal government is critical in laying the foundation for this endeavor.

State Amici Curiae Br. 1.

There is also no merit to petitioners' contention (Pet. 27-28) that the development of TMDLs will necessarily result in a costly program of nationwide nonpoint source pollution controls. The CWA preserves each State's discretion to determine whether, and to what extent, nonpoint source pollution should be controlled. The States, with EPA's assistance, are voluntarily undertaking those responsibilities. It is precisely because cleaning up polluted waters can be costly that all available tools—including TMDLs–should be available to the States to assist them in making reasonable and equitable decisions on how to exercise their responsibilities under state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

GREER S. GOLDMAN
RONALD M. SPRITZER
Attorneys

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