

**ADDRESSING NONPOINT SOURCE POLLUTION IN THE FIFTH AND
ELEVENTH CIRCUITS: COULD *PRONSOLINO* HAPPEN IN
MISSISSIPPI AND ALABAMA?**

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I. INTRODUCTION

The Clean Water Act (CWA), first enacted in 1972¹ and significantly amended in 1987², has driven the cleanup of countless American waterways that had been befouled by the by-products of over a century of industrial expansion. Perhaps the CWA’s greatest strength has been the no-nonsense way it has stanchd the discharge of pollutants into U.S. waters from “point sources” like industrial outfall pipes. Rivers that once literally caught fire because of chemical pollution no longer do so.³

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¹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816-904 (1972) (codified as amended in scattered sections of 33 U.S.C.).

² Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat.7.

³ See *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting) (“In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [Clean Water Act]. The Act proclaimed the ambitious goal of ending water pollution by 1985. . . . Although Congress’ vision of zero pollution remains unfulfilled, its pursuit has unquestionably retarded the destruction of the aquatic environment. Our Nation’s waters no longer burn.”).

Much work remains to be done, however. Many water bodies continue to be heavily polluted by pollution from “nonpoint sources.” The most prevalent nonpoint sources include runoff from agricultural, silvicultural, and construction activities.

The notorious “dead zone” in the Gulf of Mexico provides a compelling example of the environmental destruction nonpoint source pollution can cause. The dead zone, which in 2004 covered 5,800 square miles,⁴ is defined by oxygen levels too low to support most marine life—a condition known as hypoxia.⁵ Hypoxia is the result of the process of eutrophication, which occurs when an overabundance of nutrients triggers increased algal production.⁶ When the algae die, their decomposition consumes oxygen.⁷ Nutrients, in the form of agricultural fertilizers, make their way from farmland to the Gulf via runoff into the Mississippi River. According to the National Oceanic and Atmospheric Administration (NOAA), this type of pollution “is one of the major stresses impacting coastal ecosystems.”⁸

In states like Mississippi and Alabama, where agriculture continues to be a dominant feature of the economic landscape, nonpoint source pollution remains a major problem. Part of the reason is because compared to its clear and muscular methods of directly regulating point source pollution, the CWA’s nonpoint source provisions are wishy-washy. Whereas point sources are subject to well-defined standards of control technology and strict numerical limits, nonpoint source regulation is a picked-over smorgasbord of studying, planning, and promises of federal money to pay for the studying and planning. To the extent nonpoint source pollution is addressed in the CWA, it is left to the states to take the lead, which they traditionally have been hesitant to do.

For years, government and private advocates for nonpoint controls have sought a way to achieve real-world improvements in nonpoint source pollution. One possible way to get results is to include nonpoint sources when calculating total maximum daily loads (TMDLs) of permissible pollution discharge under section 303(d) of the CWA.⁹ It has long been assumed that section 303(d)

⁴ See MSNBC.com, “Dead Zone” Spreads Across Gulf of Mexico (last updated Aug. 3, 2004), <http://www.msnbc.msn.com/id/5595098>.

⁵ See National Ocean Service, National Oceanic and Atmospheric Admin., *HYPOXIA IN THE GULF OF MEXICO: Progress Towards the Completion of an Integrated Assessment*, at http://www.nos.noaa.gov/products/pubs_hypox.html (follow “Introduction” hyperlink [hereinafter “NOAA”]) (last modified Aug. 6, 2003).

⁶ *Id.*

⁷ See EPA-MAIA, *Eutrophication*, at <http://www.epa.gov/maia/html/eutroph.html> (last modified July 26, 2005).

⁸ NOAA, *supra* note 5.

⁹ 33 U.S.C. § 1313(d) (2000).

applies to waters polluted by point sources only, or a combination of point and nonpoint sources. However, ambiguity in the statutory language has left open the question of whether section 303(d) applies to waters polluted *only* by nonpoint sources. The applicability of section 303(d) to such waters could be of great concern in states like Mississippi, which has many of this type of water-quality limited stream segments. The potential exists for significantly more pressure to be brought on such states to clean up their water.

Unless Congress amends the CWA to make clear whether section 303(d) applies to waters polluted only by nonpoint sources (which is unlikely at this time¹⁰), courts will be deciding the question. So far, the highest court to do so is the U.S. Court of Appeals for the Ninth Circuit, the only U.S. Appellate Court to take up the issue.

Of course, a Ninth Circuit decision is not controlling in Mississippi and Alabama, which are in the Fifth and Eleventh circuits, respectively. However, a thorough analysis of the Ninth Circuit decision may have useful predictive value for how such a case might be resolved in the Fifth and Eleventh Circuits.

This paper provides that analysis. The structure of the CWA with respect to point and nonpoint sources is discussed for background purposes. Water quality standards, the regulatory framework in which nonpoint source pollution resides (as it is generally not amenable to technology-based control—like point source pollution is), are described. Also discussed is the TMDL mechanism and the controversy over applying it to waters polluted only by nonpoint source pollution. The Ninth Circuit decision is closely examined, followed by an analysis of relevant cases from the Fifth and Eleventh circuits. The paper concludes with an estimation of the likelihood of a decision similar to *Pronsolino* (the Ninth Circuit case discussed above) becoming the law of the Fifth and Eleventh circuits.

II. POINT AND NONPOINT SOURCES

The CWA divides sources of water pollution into two types: point sources and nonpoint sources. A “point source” is defined in the CWA as:

¹⁰ *Clean Water Authority Restoration Act of 2003*, S. 473, 108th Cong. (2003). A recent congressional attempt to settle another question about the extent of CWA jurisdiction has stalled indefinitely as this bill has languished in committee since February 2003.

any discernable [sic], confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.¹¹

Point sources are subject to the permit requirements of the National Pollutant Discharge Elimination System (NPDES).¹² Discharge of a pollutant from a point source into the waters of the United States without a NPDES permit is illegal and can incur administrative, civil, and/or criminal penalties upon the discharger.¹³ To hold a permit, a point source discharger must achieve specific technology-based effluent limitations; in other words, he must clean it before he can discharge it.¹⁴ The NPDES program has been enormously successful in reducing pollution from point sources.

Unfortunately, other sources of water pollution—nonpoint sources—were mostly neglected for the first twenty-five or so years after the passage of the 1972 Act. The CWA does not define nonpoint source pollution, but it is basically any anthropogenic or naturally occurring pollution that does not come from a point source. The most common source of nonpoint source pollution is runoff from rainfall, snowmelt, or irrigation that picks up pollutants on the ground and deposits them in streams, lakes, or coastal waters.¹⁵ Agricultural and silvicultural runoff, as well as runoff from roads and parking lots, are major nonpoint sources. Others include “grazing, septic systems, recreational boating, urban runoff, construction, physical changes to stream channels, and habitat degradation.”¹⁶ The most pervasive nonpoint source pollutants are sediment and nutrients; other common nonpoint source pollutants include “pesticides, pathogens (bacteria and

¹¹ 33 U.S.C. § 1362(14) (2000).

¹² *See id.* § 1342.

¹³ *See id.* §§ 1311(a), 1319.

¹⁴ *See id.* § 1311(b).

¹⁵ U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA841-F-96-004A, NONPOINT SOURCE POLLUTION: THE NATION'S LARGEST WATER QUALITY PROBLEM (1996).

¹⁶ *Id.*

viruses), salts, oil, grease, toxic chemicals, and heavy metals.”¹⁷ Although municipal point sources remain a problem, agricultural and urban runoff are the major sources of water quality impairment in the U.S.¹⁸ Nonpoint source pollution is estimated to account for approximately half of the country’s remaining water pollution.¹⁹

Unlike point source pollution, which is directly regulated via NPDES permits, nonpoint source pollution is not directly regulated by the CWA.²⁰ Instead, the CWA holds out the promise of federal funds for states that address nonpoint source pollution in their section 208 areawide waste treatment management plans²¹ and section 319 nonpoint source management programs.²²

III. ADDRESSING NONPOINT SOURCE POLLUTION UNDER THE CLEAN WATER ACT

The CWA uses two core strategies to attack water pollution: technology-based effluent limitations and water quality standards. The water quality standards approach was developed in the Water Quality Act of 1965,²³ but it met with very limited success; to supplement water quality standards, Congress added the technology-based effluent limitation approach in 1972.²⁴

Effluent limitations, by definition, are hard numbers (specific quantities, rates and/or concentrations) that apply only to point sources.²⁵ Water quality standards may or may not include hard numbers, and by their nature encompass pollution from both point and nonpoint sources. Effluent limitations focus on the *quality of the water coming out of the pipe*; water quality standards focus on the *quality of the receiving water*. Effluent limitations and water quality standards come together in the TMDL.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ CLAUDIA COPELAND, ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CLEAN WATER ACT: A SUMMARY OF THE LAW, CONG. RESEARCH SERV. REP. RL 30030 (updated Jan. 24, 2002).

²⁰ *See Oregon Nat. Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998).

²¹ 33 U.S.C. §§ 1288(b)(2) (2000) (describing requirements of plan, including identification of nonpoint sources and procedures and methods to control them), 1288(f) (describing grants to state and local agencies to cover costs of developing and operating planning process).

²² *Id.* §§ 1329(b) (describing programs), 1329(h) (concerning grants for implementing programs).

²³ Pub. L. No. 89-234, 79 Stat. 903 (1965).

²⁴ *See Copeland, supra* note 19.

²⁵ *See* 33 U.S.C. § 1362(11) (2000).

A. Water Quality Standards

Section 303 of the CWA requires states to establish water quality standards for the waters within their boundaries that are subject to CWA jurisdiction.²⁶ If a state fails to do so, the Environmental Protection Agency (EPA) must promulgate standards for that state.²⁷

The water quality standard is a straightforward, commonsensical approach to pollution control. In effect, it is based on the answers to two simple questions: what purposes must this water body serve and how clean must it be to serve those purposes? The answers to these questions become the two primary components of the water quality standard: designated uses of the water body and water quality criteria based upon those uses.²⁸

Designated uses must include, at a minimum, so-called “existing uses”. Existing uses are defined as “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.”²⁹ In other words, if the water body was being used for a particular purpose on or after November 28, 1975, then that use *must* be protected. Use designation should also consider the water body’s “use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration...navigation.”³⁰ Examples of designated uses include public water supply, shellfish harvesting, recreation, and fish and wildlife.³¹

Once uses are designated, the state must establish water quality criteria to ensure that the designated uses are protected.³² Criteria typically include standard water quality indicators like temperature, pH, and dissolved oxygen, as well as limits on toxic pollutants (e.g., dioxin, heavy metals) and non-toxic pollutants (e.g., sediment, heat). If a water body has multiple designated

²⁶ *Id.* § 1313(a), (c).

²⁷ *See id.* § 1313(b).

²⁸ *See id.* § 1313(c)(2)(A).

²⁹ 40 C.F.R. § 131.3(e) (2005). Neither the CWA nor the regulations explicitly states that designated uses must include existing uses; however, the requirement is implicit in the antidegradation policy regulations, which mandate that, at a minimum, “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” *Id.* § 131.12(a)(1).

³⁰ 33 U.S.C. § 1313(c)(2)(A) (2000). *See also* 33 U.S.C. § 1251(a)(2) (2000) (declaring Congress’ “national goal” of achieving “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water”).

³¹ These are among the designated uses in Mississippi. OFFICE OF POLLUTION CONTROL, MISS. DEPT. OF ENVTL. QUALITY, STATE OF MISSISSIPPI WATER QUALITY CRITERIA FOR INTRASTATE, INTERSTATE AND COASTAL WATERS (adopted 2002; approved by the EPA 2003).

³² 33 U.S.C. § 1313(c)(2)(A) (2000).

uses, the criteria must protect the most sensitive use.³³ Criteria may consist of specific numerical limits or may be in narrative form.³⁴ The EPA also develops criteria for guidance purposes,³⁵ but it is the state criteria that are legally enforceable.

An additional element of the legal framework that affects the establishment of water quality standards is the antidegradation policy.³⁶ This policy is designed to prevent states from allowing waters that exceed the bare minimum water quality requirements to deteriorate to the lowest acceptable level.

Antidegradation is divided into three tiers. Tier I includes all waters for which the water quality necessary to support all existing uses must be maintained.³⁷ Tier I regulation has the effect of protecting all existing uses, even if a state has not formally designated those uses. Tier II protects the subset of Tier I waters that are of quality higher than that necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water (waters meeting this minimum standard are often referred to as “fishable/swimmable”).³⁸ Uses that require water quality higher than fishable/swimmable may be “un-designated” if social and/or economic development in the area require a degradation in water quality.³⁹ In order to “un-designate,” the state must go through an administrative process that includes public participation, and water quality may not be degraded below Tier I standards.⁴⁰ Tier III waters, or “outstanding [n]ational resource waters,” are of the highest quality, and *no* degradation is allowed.⁴¹ Tier III waters include “waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance.”⁴²

³³ 40 C.F.R. § 131.11(a)(1) (2005).

³⁴ *Id.* §131.11(b).

³⁵ 33 U.S.C. § 1314(a). The EPA may reject a state criterion that is less stringent than its own if the state cannot adequately justify the weaker standard. *See* *Miss. Comm'n. on Natural Res. v. Costle*, 625 F.2d 1269 (5th Cir. 1980) (upholding EPA's disapproval of Mississippi's dissolved oxygen standard, and promulgation of its own standard). The EPA may, however, accept a less stringent state criterion if it is scientifically defensible and protective of the designated use. *See* *Natural Res. Def. Council v. U.S. Eenvtl. Prot. Agency*, 16 F.3d 1395 (4th Cir. 1993) (upholding the EPA's approval of Virginia's and Maryland's relaxed standard for dioxin).

³⁶ *See* 33 U.S.C. § 1313(d)(4)(B) (2000); 40 C.F.R. § 131.12 (2005).

³⁷ *See* 40 C.F.R. § 131.12(a)(1) (2005).

³⁸ *See id.* § 131.12(a)(2). The “fishable/swimmable” standard is announced in the Congressional declaration of goals and policy in § 101 of the CWA (enacted at 33 U.S.C. § 1251(a)(2) (2000)).

³⁹ *See* 40 C.F.R. § 131.12(a)(2) (2005).

⁴⁰ *See id.*

⁴¹ *Id.* § 131.12(a)(3).

⁴² *Id.*

The antidegradation policy is an “anti-backsliding” measure. It is not a water quality standard in itself, as it is entirely narrative and features no numerical limits.

B. Total Maximum Daily Loads

Water quality standards by themselves accomplish nothing—the standards must be *implemented* for the CWA to be effective. The Total Maximum Daily Load (TMDL) is intended to be the implementation tool for polluted waters, and it is the next step in the common sense approach that begins with the water quality standard. After it is determined what uses are to be made of the water body and what water quality is necessary to protect those uses, the TMDL answers the next logical question: how much pollution can each source contribute while still maintaining the necessary water quality?

The TMDL answers that question by serving as a “pollution budget.”⁴³ Working backwards from the water quality standard, the regulating entity determines how much of each pollutant can be added to the water body daily without violating the standard.⁴⁴ That amount is considered the *loading capacity*.⁴⁵ The loading capacity is allocated among existing and future point, nonpoint, and background sources.⁴⁶ The TMDL is the sum of these allocations, with an accounting for seasonal variations and a margin of safety.⁴⁷ Ideally, water quality standards will be attained by harmonizing those allocations.⁴⁸

Many water bodies, of course, fail to maintain the necessary water quality, so the first step in the TMDL process is identifying and prioritizing polluted water bodies. CWA section 303(d)(1)(A) mandates that:

[e]ach State shall identify those waters within its boundaries for which the effluent limitations [on point sources] are not stringent enough to

⁴³ JOINT STATEMENT OF THE DEP'T OF AGRICULTURE AND THE EPA ADDRESSING AGRICULTURAL AND SILVICULTURAL ISSUES WITHIN EPA REVISIONS TO TMDL AND NPDES RULES (May 1, 2000), <http://www.epa.gov/owow/tmdl/tmdlwhit.html>.

⁴⁴ *Id.*

⁴⁵ 40 C.F.R. § 130.2(f) (2005).

⁴⁶ A portion of the loading capacity allocated to a point source is a “wasteload allocation.” *Id.* § 130.2(h). A portion allocated to a nonpoint source or natural background loading is a “load allocation.” *Id.* § 132.2(g).

⁴⁷ 33 U.S.C. § 1313(d)(1)(C) (2000); 40 C.F.R. § 130.2(i) (2005).

⁴⁸ See CLAUDIA COPELAND, CLEAN WATER ACT AND TOTAL MAXIMUM DAILY LOADS (TMDLS), CONG. RESEARCH SERV. REP. 97-831 ENR (updated Feb. 13, 2003).

implement any water quality standard 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.⁴⁹

This is key language. Waters that are identified as not meeting water quality standards, despite the application of effluent limitations to point sources, will be put on the “303(d)(1) list” and required to have formal TMDLs established. Waters not placed on the 303(d)(1) list are required to have only “estimated” TMDLs.⁵⁰

The TMDL process, including provisions for public involvement, must be detailed in the state’s continuing planning process that is mandated by section 303(e).⁵¹ The continuing planning process must include, among other things, “[t]he process for developing total maximum daily loads (TMDLs) and individual water quality based effluent limitations for pollutants”⁵² and “[t]he process for establishing and assuring adequate implementation of new or revised water quality standards, including schedules of compliance.”⁵³

Establishing full-blown TMDLs through the formal TMDL process involves considerable effort. To develop its 303(d)(1) list, the state must first “assemble and evaluate all existing and readily available water quality-related data and information.”⁵⁴ Once this

⁴⁹ 33 U.S.C. § 1313(d)(1)(A) (2000).

⁵⁰ *Id.* § 1313(d)(3).

⁵¹ 33 U.S.C. § 1313(e) (2000); *see* 40 C.F.R. § 130.7(a) (2005). “The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLA/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State’s list of segments identified, priority ranking, and loads established (WLA/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State’s WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP)”. *Id.*

⁵² 40 C.F.R. § 130.5(b)(3) (2005).

⁵³ *Id.* § 130.5(b)(6). A state must have an EPA-approved continuing planning process before EPA can authorize the state to administer its own NPDES program. *See also* 33 U.S.C. § 1313(e)(2) (2000). The state need not have actually implemented or completed any TMDLs, or cleaned up any water at all. It need only have developed the processes to do so.

⁵⁴ 40 C.F.R. § 130.7(b)(5) (2005). This data and information includes, at a minimum, that concerning “(i) [w]aters identified by the State . . . as ‘partially meeting’ or ‘not meeting’ designated uses or as ‘threatened’; (ii) [w]aters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards; (iii) [w]aters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and

task is complete, the state is to identify and prioritize “water quality-limited segments” needing TMDLs and provide documentation to EPA supporting the listing decisions.⁵⁵ The state must then establish the TMDLs for the identified water quality-limited segments.⁵⁶ EPA approves or disapproves the listings and TMDLs.⁵⁷ And, as noted above, the public must be included in the process.⁵⁸

IV. THE CONTROVERSY OVER APPLYING TMDLS TO NONPOINT SOURCES

In describing the waters that are potentially subject to TMDLs, section 303(d) alludes to point source pollution but is silent on nonpoint source pollution. The section encompasses those waters “for which . . . effluent limitations . . . are not stringent enough to implement any water quality standard.”⁵⁹ “Effluent limitations” apply only to point sources. Only in the regulations, which require the loading capacity to be allocated among the various types of sources, is nonpoint source pollution clearly mentioned in the TMDL context.⁶⁰

Because of the statutory ambiguity, the potentially regulated nonpoint source community has argued that section 303(d) does not apply to nonpoint sources.⁶¹ For clarification (among other reasons), the EPA in 1999 proposed a revision to its TMDL regulations that explicitly stated that section 303(d) does

Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and (iv) [w]aters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.” *Id.* This requirement potentially encompasses an enormous amount of data and information.

⁵⁵ 40 C.F.R. § 130.7(b)(1)-(2), (4), (6) (2005). The documentation must include, at minimum: “(i) [a] description of the methodology used to develop the list; and (ii) [a] description of the data and information used to identify waters, including a description of the data and information used by the State as required by § 130.7(b)(5); and (iii) [a] rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in §130.7(b)(5); and (iv) [a]ny other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in § 130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.” *Id.* § 130.7(b)(6). This is no small amount of documentation.

⁵⁶ *Id.* § 130.7(c)(1).

⁵⁷ *Id.* § 130.7(d)(2).

⁵⁸ See *supra* note 51 and accompanying text.

⁵⁹ 33 U.S.C. § 1313(d)(1)(A) (2000).

⁶⁰ 40 C.F.R. § 130.2 (2005); see *supra* note 51 and accompanying text.

⁶¹ See Oliver Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10391 (1997).

apply to nonpoint sources.⁶² The final rule, retaining this provision, was issued in July 2000,⁶³ but Congress quickly acted to block the rule by adding a rider to an appropriations bill forbidding EPA to fund its implementation for fiscal years 2000-2001 (through October 2001).⁶⁴ In response to public and scientific criticism of the rule, EPA delayed its implementation until April 30, 2003.⁶⁵ In March 2003, the rule was withdrawn before it was ever implemented.⁶⁶ The ambiguity concerning the applicability of section 303(d) to nonpoint sources remains – except in the Ninth Circuit.

A. *The Pronsolino Case*

The Garcia River drains 73,222 acres of northern California's heavily forested Mendocino County as it meanders towards its terminus at Point Arena.⁶⁷ From time immemorial into the 20th century, the Garcia's cold, clear water supported runs of steelhead trout and coho, pink, and chinook salmon.⁶⁸ Today, as a result of sedimentation from logging and other erosive land use practices, only steelhead and a small remnant population of coho remain.⁶⁹

In keeping with its capability to support coho and steelhead, the Garcia River's designated uses include cold

⁶² Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,012, 46,020 (proposed Aug. 23, 1999) (to be codified at 40 C.F.R. pt. 130).

⁶³ Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

⁶⁴ Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, 114 Stat. 511, 567 (2000).

⁶⁵ Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulations; and Revision of the Date for State Submission of the 2002 List of Impaired Waters; 66 Fed. Reg. 53,044 (Oct. 18, 2001) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130); see also Linda A. Malone, *The Myths and Truths that Threaten the TMDL Program*, 32 ENVTL. L. REP. 11133 (2002) (describing controversy over rule).

⁶⁶ Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608 (Mar. 19, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

⁶⁷ See CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, REFERENCE DOCUMENT FOR THE GARCIA RIVER WATERSHED WATER QUALITY ATTAINMENT ACTION PLAN FOR SEDIMENT 19 (Sept. 21, 2000).

⁶⁸ Friends of the Garcia River (FrOG), <http://www.rcwa.us/garcia/>.

⁶⁹ *Id.*; see generally LARRY R. BROWN & PETER B. MOYLE, STATUS OF COHO SALMON IN CALIFORNIA, REPORT TO THE NATIONAL MARINE FISHERIES SERVICE (1991), http://www.krisweb.com/biblio/gen_nmfs_brownetal_1991.pdf; Gregg Patterson, *California Dreamweavers*, TROUT MAGAZINE, Winter 2001, <http://www.tucalifornia.org/tm-garcia.htm>.

freshwater habitat; migration of aquatic organisms; estuarine habitat; and spawning, reproduction, and/or early development.⁷⁰ These uses can be impaired when there is too much sediment in the water. Because of the excess of sedimentation in the Garcia, the river was added to California's section 303(d) list in 1992.⁷¹ California initially failed to establish TMDLs for the Garcia; fishing and environmental groups sued the state to force it to do its legal duty.⁷² Although the state signed a consent decree agreeing to establish the Garcia River TMDL, it failed to finalize its draft TMDL in a timely manner, which prompted the EPA to issue its own TMDL (which was virtually identical to the state's draft TMDL).⁷³

The Garcia River TMDL limits sediment loading in the Garcia River to 552 tons per square mile per year.⁷⁴ This figure was chosen to achieve the goal of reducing the average annual sediment load by sixty percent.⁷⁵ The TMDL was broken down into five load allocations: mass wasting from natural background, mass wasting from roads, mass wasting from timber harvesting, runoff from road surfaces, and runoff from road and skid trail crossings and gullies from diversions on roads and skid trails.⁷⁶ The TMDL included no wasteload allocations for point sources because the river was polluted only by nonpoint sources.

The EPA, in accordance with its regulations, required the state to incorporate the TMDL, along with "appropriate implementation measures," into the State Water Quality Management Plan.⁷⁷ California's North Coast Regional Water Quality Control Board determined that failure to implement the TMDL would spur the EPA to withdraw its federal funding to the state.⁷⁸ The California Department of Forestry (CDF), which licenses timber-harvesting plans, concurred.⁷⁹

The TMDL soon made itself known to landowners on the river. In 1998 Betty and Guido Pronsolino applied to the CDF for a permit to harvest the timber on their eight hundred acres in the Garcia River watershed.⁸⁰ CDF granted the permit, but in order to

⁷⁰ U.S. ENVIRONMENTAL PROTECTION AGENCY, GARCIA RIVER SEDIMENT TOTAL MAXIMUM DAILY LOAD 8 (Mar. 16, 1998) [hereinafter *Garcia River TMDL*].

⁷¹ *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) (*Pronsolino (II)*).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Garcia River TMDL* at 36.

⁷⁵ *Id.* at 37.

⁷⁶ *Id.* at 36.

⁷⁷ *Id.* at 6; 40 C.F.R. §§ 130.6(c)(1), 130.7 (2005).

⁷⁸ *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1340 (N.D. Cal. 2000) (*Pronsolino (I)*).

⁷⁹ *Id.*

⁸⁰ *See Pronsolino (II)*, 291 F.3d 1123, 1129.

comply with the TMDL, it imposed various restrictions on the harvest plan.⁸¹ The Pronsolinos' forester estimated that compliance with the restrictions would cost the Pronsolinos at least \$750,000.⁸² Two other area landowners, Larry Mailliard and Bill Barr, applied for timber harvesting permits around the same time and were similarly restricted, at estimated costs of \$10,602,000 and \$962,000, respectively.⁸³

The Pronsolinos, Mailliard, and Barr, joined by the Mendocino County Farm Bureau, the California Farm Bureau, and the American Farm Bureau Federation (collectively, "the plaintiffs") went to court. Rather than suing the state on the ground that its restrictions were excessive, or the EPA on the ground that the TMDL was arbitrary or capricious, the plaintiffs went straight to the heart of the matter and sued the EPA on the ground that it lacked the authority to issue a TMDL *at all* for a water body polluted only by nonpoint sources.⁸⁴ This line of attack primarily targeted the EPA's interpretation of its own TMDL regulations, which in turn implicated the EPA's interpretation of the CWA.

As noted above, Congress did not explicitly authorize the EPA to apply section 303(d) to waters polluted only by nonpoint source pollution in the CWA. Under section 303(d)(1)(A), each state must identify "those waters within its boundaries for which the effluent limitations [on point sources] are not stringent enough to implement any water quality standard applicable to such waters."⁸⁵ There are at least two possible interpretations of this language. The first (and more expansive) interpretation, offered by the EPA, is that section 303(d) applies to all waters not meeting water quality standards. The second (and more restrictive) interpretation, asserted by the plaintiffs, is that section 303(d) applies only to waters that are not meeting water quality standards *and* are polluted by at least one point source. Because the issue is unsettled in other circuits, the arguments marshaled

⁸¹ *See id.* at 1130, n.6. The restrictions included retaining trees of a certain size, refraining from harvesting trees from unstable areas, and other measures to prevent or mitigate sediment loading of watercourses that lead to the Garcia River.

⁸² *See id.* at 1130.

⁸³ *See id.*

⁸⁴ The plaintiff's cause of action was the judicial review chapter of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). The APA gives a person who is "adversely affected or aggrieved by [federal] agency action" a statutory right to challenge the action in court. *Id.* § 702. The reviewing court has the power to set aside an agency action that is "arbitrary, capricious, . . . or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." *Id.* § 706(2).

⁸⁵ 33 U.S.C. § 1313(d)(1)(a) (2000).

by the plaintiffs and the EPA are likely to reappear in other cases and are therefore worthy of examination.

Predictably, each side argued that the text of the statute unambiguously supported its position, and that even if the statute was ambiguous, its interpretation should prevail. Thanks to Congress' diabolically inelegant language, both sides could make strong arguments for their completely contradictory interpretations. The plaintiffs asserted that section 303(d) plainly refers only to waters in which point source controls have been insufficient to meet water quality standards. They argued it would therefore be nonsensical to apply the statute to waters without point source controls.⁸⁶ The EPA countered that the statutory language refers to waters that fail to meet standards, but does not exclude waters polluted only by nonpoint sources; thus, according to the EPA, the statute encompasses *all* waters that do not meet water quality standards, regardless of whether point sources contribute to the problem or not.⁸⁷

In the EPA's view, its interpretation of the text harmonizes with the text's location in the section of the CWA entitled "Water quality standards and implementation plans."⁸⁸ After all, the water quality standard approach, unlike the technology-based approach, focuses on the quality of the receiving water, regardless of whether the pollutants it receives come from point or nonpoint sources. Section 303(a)-(b) commands states to establish water quality standards for all their waters, and TMDLs are to be a tool for implementing the standards. A vast number of water bodies in the U.S. are impacted only by nonpoint source pollution, so unless Congress intended for water quality standards to be established, but *not* to be implemented in these regions, it follows that TMDLs should be established for all substandard waters.⁸⁹

Or does it follow? In the plaintiffs' estimation, section 303's primary *raison d'être* is not to implement water quality standards, but rather to force the development of better point source control technology.⁹⁰ They argued that TMDLs are to be used as a diagnostic tool to discover the cases in which standards are not being met despite use of the best practicable technology to treat

⁸⁶ See Opening Br. of Plaintiff-Appellants at 17-18, *Pronsolino (II)* (Nos. 00-16026, 00-16027), 2000 WL 33982496.

⁸⁷ Br. of Fed. Appellees at 21, *Pronsolino(II)* (Nos. 00-16026, 00-16027), 2000 WL 33983574.

⁸⁸ *Id.* at 21-22.

⁸⁹ *Id.* at 23-24.

⁹⁰ See Opening Br. of Pl.-Appellants at 22-24, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

point sources.⁹¹ Presumably, regulatory pressure to improve the technology would then come to bear upon point source dischargers.

The plaintiffs went on to contend that section 303 does not cover nonpoint source pollution because Congress addressed nonpoint source pollution in sections 208 and 319.⁹² Section 208, entitled “Areawide waste treatment management,” requires states to identify areas that have “substantial water quality control problems” and develop a plan that must include a process to identify and manage nonpoint sources of pollution, specifically including agricultural and silvicultural sources.⁹³ The section 208 “carrot” is the promise of federal grant money for development and operation of the planning process.⁹⁴ Section 319, entitled “Nonpoint source management programs,” requires states to identify waters that, “without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards.”⁹⁵ To control nonpoint source pollution in the identified waters, the states must develop management programs identifying best management practices and the educational and enforcement programs necessary to implement those practices.⁹⁶ As with section 208, the federal government encourages implementation of these programs by offering money to offset implementation costs.⁹⁷

In response to the plaintiffs’ argument that including nonpoint source pollution within section 303 rendered that section redundant with sections 208 and 319, the EPA described how the sections work together to maximize the probability that water quality standards will be attained.⁹⁸ Section 208 applies to a wider range of water bodies than section 303, and section 319 functions as a tool for implementing TMDLs, rather than as a replacement for the section 303 TMDL requirement.⁹⁹

By the arguments recounted above, each party sought to prove that section 303 unambiguously said what that party claimed it said. When a statute is unambiguous, the agency administering the statute cannot “interpret” it; the agency has no option except to do what the statute commands. Thus, if either

⁹¹ See *id.* “Best practicable technology,” or BPT, is the standard of control technology with which point sources (other than municipal treatment works) must comply. 33 U.S.C. § 1311(b)(1)(A) (2005).

⁹² See Opening Br. of Pl.-Appellants at 27-31, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

⁹³ 33 U.S.C. § 1288(a)(2), (b)(1)(A), (b)(2)(F) (2005).

⁹⁴ *Id.* § 1288(f).

⁹⁵ *Id.* § 1329(a)(1)(A).

⁹⁶ *Id.* § 1329(b)(1)-(2).

⁹⁷ *Id.* § 1329(h).

⁹⁸ Br. of Fed. Appellees at *27-31, *Pronsolino (II)* (Nos. 00-16026, 0016027).

⁹⁹ *Id.*

party could show that the statute was unambiguous in its favor, the conflict would be over and that party would win.

The parties no doubt were aware, however, that the statutory text is not unambiguous. Consequently, the related question arose of how much deference the courts should give the EPA's interpretation of the statute at issue. In addition, when the EPA determined that a TMDL was required on the Garcia River, it was not interpreting the statute; it was interpreting its own TMDL regulations, which were themselves an interpretation of section 303(d).

When a statute is ambiguous with respect to a specific situation, the agency charged with administering the statute has to interpret it, as EPA did when it interpreted section 303 as applying to waters polluted solely by nonpoint source pollution. Such interpretations are subject to judicial review. Under the Administrative Procedure Act (APA), a person who is "adversely affected or aggrieved" by a final agency action (such as the establishment of a TMDL) is entitled to sue the agency.¹⁰⁰ The reviewing court can set aside the action if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ."¹⁰¹

When faced with an APA challenge, courts bring to their deliberations the understanding that the defendant agency typically has a more thorough grasp of the subject matter than the court does. This is a result of the agency being charged by Congress with administering the statute in controversy.¹⁰² Accordingly, a court will defer to the agency's decision, to some extent, and refrain from "substitut[ing] its judgment for that of the agency."¹⁰³ Separation of powers doctrine counsels this approach because Congress is presumed to have given the executive branch (the agency) and not the judicial branch (the court) the authority to resolve ambiguities.¹⁰⁴

There are various levels of deference, all underlain by these principles, that courts give to agency actions. The level of deference given depends on the type of action in question. When the challenged action is an agency's interpretation of an ambiguous statute that it administers, courts typically employ the

¹⁰⁰ 5 U.S.C. §§ 702, 704 (2000).

¹⁰¹ *Id.* § 706.

¹⁰² *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

¹⁰³ *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰⁴ *See United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

test described by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, stating “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁰⁵ This so-called “*Chevron* deference” is indeed quite deferential. The agency’s interpretation need not be the best one possible, or one the court favors; it need only be one that the statute does not appear to prohibit. *Chevron* deference is due when “Congress [has] delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁰⁶ Generally speaking, this rule means that *Chevron* deference will be given only if the interpretation in question was made in a formal adjudication, or has been through notice-and-comment rulemaking.¹⁰⁷

Other interpretations, which have not been subjected to the adversarial process of an adjudication—or the slings and arrows of public input—and do not have the force of law, are entitled to less deferential “*Skidmore* deference,” named after the 1944 U.S. Supreme Court case *Skidmore v. Swift & Co.*¹⁰⁸ *Skidmore* deference applies “where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked.”¹⁰⁹ Under *Skidmore*, if an agency acts with a degree of congressional authorization and/or formality less than what is required for *Chevron* deference, then judicial deference “depend[s] upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹¹⁰ Such interpretations may be promoted in guidance documents, policy statements, opinion letters, and the like.¹¹¹

¹⁰⁵ *Chevron*, 467 U.S. at 843.

¹⁰⁶ *Mead*, 533 U.S. at 226-27.

¹⁰⁷ *See id.* at 227 (“Delegation of such authority [to make rules carrying the force of law] may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”); *see also* *Wilderness Watch and Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004) (indicating that formal rulemaking is required for an agency interpretation to merit *Chevron* deference).

¹⁰⁸ 323 U.S. 134 (1944).

¹⁰⁹ *Mead*, 533 U.S. at 237.

¹¹⁰ 323 U.S. at 140.

¹¹¹ *See* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters --like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion

There is a third relevant deference level which applies when the challenged action is the agency's interpretation of its own ambiguous regulation. Courts are very deferential to the agency, giving the agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."¹¹² This is usually referred to as "*Seminole Rock* deference," after the 1945 U.S. Supreme Court case that first recognized it, *Bowles v. Seminole Rock & Sand Co.*¹¹³ Despite the fact that the Court's majority opinion in *U.S. v. Mead* indicates there are no interstices to fill between *Chevron* deference, *Skidmore* deference, and no deference, *Seminole Rock* deference is considered to have ongoing vitality.¹¹⁴

The *Pronsolino* court did not expressly consider whether the EPA's existing regulations were permissible interpretations of the CWA; rather, the court focused on whether the decision to establish a TMDL for the Garcia River was a permissible interpretation of the agency's existing regulations. Prior to *Mead*, this situation plainly would have called for the *Seminole Rock* standard. The court, however (perhaps out of a surfeit of wariness upon entering the post-*Mead* thicket of *Chevron* deference, *Skidmore* deference, and *Seminole Rock* deference), measured the EPA's action against all three standards.¹¹⁵

The court observed first that Congress, in the CWA, had given the EPA authority to write rules with the force of law to implement the statute,¹¹⁶ and that the EPA wrote the TMDL regulations pursuant to that authority, so according to *Mead* the regulations are due *Chevron* deference.¹¹⁷ Turning to the EPA's interpretation of the regulation in this case, the court found that "[n]o reason appears why, under this TMDL definition, the amount of either point source loads or nonpoint source loads cannot be

letters are 'entitled to respect' under our decision in [*Skidmore*], but only to the extent that those interpretations have the 'power to persuade.'").

¹¹² *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

¹¹³ 325 U.S. 410 (1945).

¹¹⁴ See, e.g., *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 643-44 (6th Cir. 2004); see also *Mead*, 533 U.S. at 246 (Scalia, J., dissenting) (noting that the *Seminole Rock* principle that "judges must defer to reasonable agency interpretations of their own regulations" was left "untouched" by the majority opinion, which describes an indistinct deference framework that seems to consist only of *Chevron* and *Skidmore*).

¹¹⁵ *Pronsolino (II)*, 291 F.3d 1123, 1130-35.

¹¹⁶ *Id.* at 1131. See 33 U.S.C. §§ 1361(a) (2000) ("The Administrator [of the EPA] is authorized to prescribe such regulations as are necessary to carry out his [sic] functions under this Act"), 1313(d)(2) (granting the Administrator the authority to approve/disapprove and establish TMDLs).

¹¹⁷ The court's analysis is slightly misguided; the plaintiffs were not challenging the regulations themselves, which did not specifically say whether nonpoint source-only waters require TMDLs, but rather the EPA's interpretation of the regulations to that effect. This slip likely has little practical effect, however. See *infra* note 144.

zero.”¹¹⁸ In other words, mandating a TMDL for the Garcia River was “a permissible construction” of the regulation and was not “plainly erroneous or inconsistent with the regulation.”¹¹⁹

The court also upheld the EPA’s interpretation when it was judged against the less deferential *Skidmore* standard. Unlike *Chevron* and *Seminole Rock*, under *Skidmore* the agency must somehow persuade the court that its interpretation is proper. One method of persuasion is consistent interpretation of a statute over time. Here, the court was impressed by the EPA’s early-1970s CWA regulations, which the court read as contemplating the inclusion of waters polluted only by nonpoint sources on section 303(d) lists.¹²⁰ This was enough to overcome the plaintiffs’ argument that, until the early 1990s, the EPA had paid almost no attention to nonpoint source pollution in the TMDL context.¹²¹

The court’s examination of the language and structure of section 303(d), and the statutory scheme as a whole, bolstered its decision. Recall that the controversy revolves around section 303(d)(1)(A)’s phrase “for which the [CWA’s] effluent limitations . . . are not stringent enough to implement any water quality standard. . . .”¹²² The plaintiffs contended that “not stringent enough” refers to a situation in which effluent limitations are applied, but the application of *those particular* effluent limitations cannot get the job done; that is, the limitations themselves are defective.¹²³ The EPA countered that “not stringent enough” refers to a situation in which the application of effluent standards *in general* cannot get the job done; the limitations being applied may meet the CWA’s technology requirements, but still not be enough to ensure that water quality standards are met.¹²⁴

While conceding that the plaintiffs’ position was not “entirely implausible,” the court felt that it was “considerably weaker” than the EPA’s interpretation.¹²⁵ The EPA’s construction of the statute would bring all substandard waters into section 303(d)’s embrace, while the plaintiffs’ would exclude any substandard waters that have no point sources. The court figured

¹¹⁸ *Pronsolino (II)*, 291 F.3d at 1132.

¹¹⁹ *Id.* at 1133. The court applies *Chevron* explicitly, but the *Seminole Rock* standard (as recited in a later case, *Auer v. Robbins*, 519 U.S. 452 (1997)) is cited only in passing, in a parenthetical in support of the court’s conclusion that the EPA’s action was entitled to *Chevron* deference.

¹²⁰ *Id.* at 1133-34.

¹²¹ *Id.* at 1134; see Opening Br. of Pl.’s-Appellants at 39-48, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

¹²² 33 U.S.C. § 1313(d)(1)(A) (2000).

¹²³ *Pronsolino (II)*, 291 F.3d 1123, 1135-37.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1135.

that this “odd reading” of the statute could be avoided by considering that Congress’ intent was that the EPA would attack point source pollution first, and then nonpoint source pollution, rather than both types at once.¹²⁶ Legislative history supported this notion: Senator Muskie, who was instrumental in the development of the CWA, had noted that funding limitations might require EPA to prioritize point source above nonpoint source efforts.¹²⁷

The court was unreceptive to the plaintiffs’ argument that, because the CWA generally differentiates between point and nonpoint sources, section 303(d) must similarly differentiate.¹²⁸ The CWA does treat the two types of sources differently for some purposes, the court conceded, but the fundamental purpose of section 303 – the implementation of water quality standards – militates in favor of the EPA’s interpretation.¹²⁹ And while sections 208 and 319 undeniably concern nonpoint sources exclusively, and would overlap to some extent with section 303 if that section is applied to nonpoint sources, there is not an “irreconcilable contradiction” that precludes the application of section 303 to nonpoint sources.¹³⁰

The court also pointed out the aspect of the CWA’s structure that makes the plaintiffs’ proposed interpretation the less likely of the two. Section 303(d)(1)(A) applies to waters polluted by a blend of point and nonpoint sources (“the language admits of no other reading”), so under plaintiffs’ interpretation a water body polluted by many nonpoint sources and one insignificant point source would require a TMDL, but an identical water body without the point source would not.¹³¹

The plaintiffs’ final argument was based on federalism. Ameliorating nonpoint source pollution requires, in essence, regulating land use by restricting or prohibiting practices that engender polluted runoff.¹³² By requiring TMDLs for nonpoint source-only waters, the plaintiffs argued, the federal government was improperly intruding into the state’s traditional domain of land use regulation.¹³³ According to the plaintiffs, this intrusion potentially raised “severe constitutional questions”¹³⁴ because the

¹²⁶ *Id.* at 1136.

¹²⁷ *Id.*

¹²⁸ *Pronsolino (II)*, 291 F.3d 1123, 1137-1138.

¹²⁹ *Id.* at 1137.

¹³⁰ *Id.* at 1138.

¹³¹ *Id.* at 1139.

¹³² See generally Jim Vergura & Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 DRAKE J. AGRIC. L. 317 (2001).

¹³³ Opening Br. of Pl.’s-Appellants at 56-60, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

¹³⁴ *Id.* at 59.

dynamics of federalism do not allow the federal government to demand that a state regulate in a specific way.¹³⁵ The court was not persuaded by this argument because implementation and monitoring of the TMDL would be the states' responsibility, and the CWA does not require implementation or provide for enforcement.¹³⁶ The only penalty a state risks for failing to regulate nonpoint sources is loss of federal grant money.¹³⁷

The plaintiffs appealed the Ninth Circuit's decision to the U.S. Supreme Court, which denied, without explanation, the request to hear the case.¹³⁸ Denying a request to hear a case does not necessarily mean the Supreme Court agrees with the lower court's decision, but it does mean that the case has proceeded as far as possible and the decision will remain binding precedent in its jurisdiction unless and until it is overturned in a later case.

B. *Flaws in The Ninth Circuit's Analysis*

Before considering the likelihood of the *Pronsolino* decision being replicated in other circuits, it is necessary to expose the weaknesses in the Ninth Circuit's analysis. The court based its decision on three lines of analysis: deference to the EPA's interpretation of the statute; the statute's language and structure; and federalism concerns. Each line of analysis is considered in turn.

1. Deference

The uncertain nature of the court's deference analysis may be a result of the court's failure to identify precisely which agency interpretation it is analyzing. There are two possibilities: (1) the EPA's interpretation of CWA section 303(d) as encompassing nonpoint sources (as well as point sources) as embodied in the agency's TMDL regulations,¹³⁹ or (2) the EPA's interpretation of those regulations as encompassing waters polluted *solely* by nonpoint sources. The court begins the deference analysis by reciting the EPA's argument that its interpretation of section 303, as embodied in its regulations, warrants *Chevron* deference.¹⁴⁰

¹³⁵ Reply Br. of Pl.'s-Appellants at *14, *Pronsolino (II)* (Nos. 00-16026, 00-16027) (available in 2001 WL 34096713) (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

¹³⁶ *Pronsolino (II)*, 291 F.3d at 1140.

¹³⁷ *Id.*

¹³⁸ *Pronsolino v. Nastri*, 539 U.S. 926 (2003).

¹³⁹ 40 C.F.R. § 130.1 – 130.15 (2005).

¹⁴⁰ *Pronsolino (II)*, 291 F.3d 1123, 1131.

That is, the EPA believes the court should be examining the *first* possible interpretation listed above. Immediately thereafter the court recites the plaintiffs' argument that "the EPA's interpretation should receive no deference at all."¹⁴¹ The plaintiffs are referring to the *second* possible interpretation listed above, which the court seems to realize, but does not clearly acknowledge; in discussing the plaintiffs' position, the court notes that "[t]he pertinent regulations do, however, reflect the EPA's interpretation – that is, that the statute requires the identification on § 303(d)(1) lists of waters impaired only by nonpoint sources of pollution – and the EPA so reads its regulations."¹⁴²

Determining which interpretation is truly at issue is important because the two possible interpretations call for different deference analyses. An analysis of the EPA's interpretation of the statute, as embodied in its regulations, would merit *Chevron* deference—and thus would be very likely to be upheld—because "Congress [has] delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."¹⁴³ The EPA has legislative rulemaking authority, and the regulations were promulgated through notice-and-comment rulemaking.¹⁴⁴

The second interpretation (the EPA's interpretation of its own regulations as encompassing nonpoint source-only waters) did not go through notice-and-comment rulemaking or formal adjudication; rather, it has been expressed only in memoranda and guidance documents.¹⁴⁵ Thus, *Chevron* deference would likely be inappropriate.¹⁴⁶ There is room for debate over which deference level, *Skidmore* or *Seminole Rock*, is appropriate. If Justice

¹⁴¹ *Id.*

¹⁴² *Id.* (emphasis added).

¹⁴³ *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001).

¹⁴⁴ See *Water Quality Planning and Management*, 50 Fed. Reg. 1774, 1775-78 (Jan. 11, 1985) (to be codified at 40 C.F.R. pts. 35 and 130) (documenting responses to comments in publication of final rule).

¹⁴⁵ See *Pronsolino (II)*, 291 F.3d 1123, 1133 (describing memoranda and guidance documents); see e.g., Memorandum from Robert Perciasepe, Asst. Adm'r., EPA, to Regl. Adm'r's. and Regl. Water Div. Dirs., EPA, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)* (Aug. 8, 1997), <http://www.epa.gov/OWOW/tmdl/ratepace.html> (referring to "303(d)-listed waters impaired solely or primarily by nonpoint sources").

¹⁴⁶ The *Mead* majority makes the "likely" qualification necessary by commenting in a footnote that "the limit of *Chevron* deference is not marked by a hard-edged rule." 533 U.S. at 237 n.18. Presumably, this is because courts must now determine whether Congress expressed an intention, even implicitly, to delegate to the agency the authority to make rules with the force of law. See *id.* at 237. Justice Scalia asserted, apparently with some prescience, that "[t]he principal effect [of *Mead*] will be protracted confusion." *Id.* at 245 (Scalia, J., dissenting).

Scalia's opinion is accurate that *Seminole Rock* is still the correct analysis for an agency's interpretation of its own regulation, then *Seminole Rock* is clearly the proper deference level. However, the majority opinion in *Mead* does not mention *Seminole Rock* at all, and appears to contemplate only a two-tiered *Chevron-Skidmore* framework. Yet the agency interpretation at issue in *Mead* was an interpretation of a statute, so there was not necessarily any reason for the majority to mention *Seminole Rock*. Perhaps, as noted above, the Ninth Circuit was acting with an excess of caution in purporting to apply all three standards.¹⁴⁷

¹⁴⁷ Arguably, distinguishing between *Chevron* and *Seminole Rock* deference is academic hair-splitting anyway because, considered practically, there is virtually no difference between *Chevron* deference and *Seminole Rock* deference. Under *Chevron* the interpretation will be upheld if it is a "permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Under *Seminole Rock* the interpretation will be upheld "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The essence of both standards is that an interpretation will be upheld if it is not prohibited by the standard against which it is being compared - the statute (*Chevron*) or the regulation (*Seminole Rock*). Furthermore, the distinction between types of interpretation would not seem to matter from the perspective of a reviewing court. A regulation is an agency's interpretation of a statute, so an interpretation of the regulation is, in effect, a further interpretation of the statute. The statute - the manifestation of Congress' limited delegation of legislative authority to the executive branch - is the ultimate standard against which the validity of agency action must be gauged, no matter the degree of separation between the statute and the interpretation in question. An agency's power to act is restricted to the authority Congress has given it. Either the agency has the authority to make a particular interpretation or it does not. There is no reason to accord agencies different levels of deference based on how attenuated the link is between the interpretation in question and the statute.

Perhaps *Mead* did not leave *Seminole Rock* untouched, as Justice Scalia believes. In its deference analysis, the *Mead* majority emphasizes (1) the extent of congressional delegation of authority and (2) the degree of formality surrounding the agency's interpretation. Both of these factors ultimately relate to the level of control the people have over their government. This approach, despite being difficult and potentially confusing in practice, is more logical than continuing to recognize the formalistic distinction between interpretation of a statute and interpretation of a regulation. Whether *Mead* leaves *Seminole Rock* a dead letter remains to be seen; however, if it does, it may be just as well.

This is not to downplay the persuasiveness of Justice Scalia's criticism of the principle underlying the *Mead* decision: that the majority takes for the judiciary some of the interpretive authority that formerly, and properly, inhered in the executive branch. See *Mead*, 533 U.S. at 241-45 (Scalia, J., dissenting). *Pronsolino* well illustrates Justice Scalia's concerns. The EPA's decision to issue a TMDL for a nonpoint source-only river is precisely the kind of agency interpretation for which *Chevron* was meant to guide judicial review, because it involves a choice between competing policies where Congress' intent is not clear. As Justice Stevens, writing for the majority in *Chevron*, observed, the judiciary is the least appropriate branch of government to make these decisions (although sometimes they must). *Chevron*, 467 U.S. at 865-66. This stance is based on basic principles of separation of powers, and Justice Stevens' lucid explanation is worth quoting:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that

In light of the potential confusion, the safest course for the Ninth Circuit to have taken would have been to subject the regulations to the *Chevron* test (which they would likely pass¹⁴⁸) and apply both the *Skidmore* and *Seminole Rock* analyses to the interpretation of the regulations.¹⁴⁹ The court, however, conflates the two interpretations and the level of deference each interpretation merits. The court arguably ends up at the right decision, but by a very indirect path. As will be shown, despite language indicating otherwise, the court in effect applied only the *Seminole Rock* standard, and it applied it to the interpretation of the regulations.

After first noting that the EPA has authority under the CWA to issue regulations with the force of law, the court analyzes the regulations (but does not compare them to the statute), observing that “[n]o reason appears why, under [the regulations] TMDL definition, the amount of either point source loads or nonpoint source loads cannot be zero,” and concludes that the regulations “apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two.”¹⁵⁰ The interpretation the court is analyzing here is the EPA’s interpretation of its regulation as encompassing nonpoint source-only waters. According to the court’s reading of *Mead*, this interpretation is entitled only to *Skidmore* deference; according to Justice Scalia’s view of *Mead*, this interpretation would be entitled to *Seminole Rock* deference. Yet the court devotes a page and a half of its opinion to an inapposite *Chevron* analysis. This part of the opinion should not be considered persuasive outside the Ninth Circuit unless one agrees that (1) *Seminole Rock* remains the appropriate standard in this situation, and (2) the difference between *Chevron* and *Seminole Rock* deference is negligible.

The court follows the *Chevron* analysis with what it claims is a *Skidmore* analysis, which requires the agency’s interpretation

delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. Justice Scalia echoes this reasoning in his *Mead* dissent.

¹⁴⁸ See *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002) (finding an EPA interpretation of a different subsection of § 303(d) as not requiring simultaneous submission of the water quality-limited stream list and TMDLs to be reasonable under *Chevron*).

¹⁴⁹ Of course, if the interpretation passed the *Skidmore* test, the more deferential *Seminole Rock* analysis would have been unnecessary.

¹⁵⁰ *Pronsolino (II)*, 291 F.3d 1123, 1131-33.

to be in some way *persuasive*, not just permissible. In *Skidmore*, Justice Jackson allowed that a reviewing court may consider “all those factors which give [the agency’s interpretation] power to persuade.”¹⁵¹ This is an open-ended standard that gives reviewing courts great latitude. Following *Skidmore* and *Mead*, the *Pronsolino* court states that relevant factors can include “the agency’s expertise, care, consistency, and formality, as well as the logic of the agency’s position.”¹⁵² The court chooses to consider two factors in its decision. The first is agency expertise:

Section 303(d) is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues. Confronted with an issue dependent upon, and the resolution of which will affect, a complicated, science-driven statute for which the EPA has delegated regulatory authority, we consider the EPA’s interpretation of the issue informative.¹⁵³

This is all the analysis the court applies to this factor, and it is fairly open to criticism. There is no question that the CWA is a complex statute that requires the EPA to make many decisions of a highly technical nature,¹⁵⁴ but deciding whether section 303(d) applies to waters impaired only by nonpoint sources is not such a decision. It is a jurisdictional decision that merely requires knowledge of the statutory scheme adequate to make a reasoned

¹⁵¹ *Skidmore*, 323 U.S. 134, 140.

¹⁵² *Pronsolino (II)*, 291 F.3d 1123, 1131 (citing *Mead*, 533 U.S. at 228) (factors include “degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position”) (footnotes omitted), which in turn cites *Skidmore*, 323 U.S. at 140 (factors in determining an interpretation’s validity include “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements”).

¹⁵³ *Pronsolino (II)* at 1133. The weakly operative word “informative” brings to mind Justice Scalia’s criticism of *Skidmore* deference as “an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.” *Mead*, 533 U.S. at 250 (Scalia, J., dissenting).

¹⁵⁴ For example, defining the “best practicable control technology currently available” and the “best available technology economically achievable” for point sources, which requires taking into account “the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as [EPA] deems appropriate.” 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), 1314(b)(1)(B), 1314(b)(2)(B) (2000).

judgment. The EPA, being the CWA's administering agency, is likely to be intimately familiar with the CWA, and perhaps should be deferred to on that account; however, it is misleading for the court to invoke the CWA's "technically complex environmental issues" and its "science-driven" character when those things are irrelevant to the interpretation being made.

The court may have inserted the language about the CWA's complexity to enable its conclusion that the EPA's interpretation is persuasive per *Skidmore*. Prior to *Mead*, and even now if Justice Scalia is correct, this makeweight would have been unnecessary. *Chevron* or *Seminole Rock* would have applied, and under those highly deferential standards there would have been no need for the court to be "persuaded." Nonetheless, the court perceived *Mead* to be the law applicable to the situation, so the court was obliged to apply it. This factor, however, is less persuasive than the court makes it out to be. Take away the window dressing about agency expertise and the complexity of a science-driven statute, and the court's analysis of this factor reduces to acknowledging the obvious fact that the EPA has "delegated regulatory authority" for the CWA.¹⁵⁵ While that fact alone probably would have been enough to pass muster under *Chevron* or *Seminole Rock*, under *Mead/Skidmore* it is merely a factor to be considered along with any others that the court deems persuasive.

The second factor the court considers is the consistency of the EPA's interpretation of section 303(d). The court finds that the EPA has consistently interpreted section 303(d) as encompassing nonpoint source-only waters. Here, too, the court is slightly off the mark.

The court begins by asserting that the EPA's first CWA regulations "*quite clearly* required the identification on § 303(d)(1) lists of waters polluted only by nonpoint sources."¹⁵⁶ Yet the regulations are no clearer on this point than the statute itself. The regulations provided that section 303(d)(1) lists would include any water "where it is known that water quality does not meet applicable water quality standards and/or is not expected to meet applicable water quality standards even after the application of the effluent limitations require. . . ."¹⁵⁷ Like the statute, this regulation can reasonably be read as applying only to waters that are polluted by one or more point sources (that is, waters in which at least one effluent limitation is required), or waters that are polluted, but free of point sources (that is, waters in which no

¹⁵⁵ *Pronsolino (II)*, 291 F.3d at 1133.

¹⁵⁶ *Pronsolino (II)*, 291 F.3d 1123, 1133 (emphasis added).

¹⁵⁷ *Id.* (quoting 1973-1978 regulations) (citations omitted).

effluent limitations are required). Thus, contrary to the court's assessment, the regulation provides little, if any, evidence that the EPA had made a decision on the applicability of section 303(d) to nonpoint source-only waters.

At this point in the opinion, the court must address the plaintiffs' argument that the EPA's interpretation had *not* been consistent, but instead was "an invention of the early 1990s."¹⁵⁸ In support of their claim, the plaintiffs cite the fact that the EPA did not turn its attention to the states' failure to include nonpoint source-polluted waters on their section 303(d)(1) lists until the early 1990s.¹⁵⁹ The court responds by observing that, before that time, the EPA had neglected section 303(d) in general in order to expend its energy on point source pollution.¹⁶⁰ The shift in the EPA's enforcement focus did not necessarily indicate a change in its interpretation of section 303(d). The court concludes this section of its discussion by pointing out that there had been no showing that the EPA had ever interpreted section 303(d) in a manner *inconsistent* with the disputed interpretation.¹⁶¹

Of course, saying that the EPA had never interpreted the statute inconsistently with the proposed interpretation is not quite the same as saying that the EPA had always interpreted the statute consistently. The absence of a previous inconsistent interpretation may mean only that, as was the case here, the agency had never expressed its position on the subject in any form that would merit substantial judicial deference. This is weak justification for the proposed interpretation. The court should have given little weight to the fact that the plaintiffs were unable to point to a prior inconsistent interpretation when no prior interpretations worthy of substantial deference—consistent or inconsistent—had been made at all.

To summarize, once the court's four pages of deference analysis have been stripped of the inapposite application of *Chevron*, the insubstantial "agency expertise/statutory complexity," and "consistent interpretation" reasoning, what remains is that the court affords "substantial *Skidmore* deference, at the very least."¹⁶² This is because (1) the EPA has delegated regulatory authority under the CWA, and (2) the EPA had not previously made any statements *inconsistent* with its proffered interpretation. Deferring to the agency on the basis of these facts

¹⁵⁸ *Id.* at 1134.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Pronsolino (II)*, 291 F.3d 1123, 1134-35.

would be granting much more than *Skidmore* deference. It would, in effect, be granting *Seminole Rock* deference, which requires only that the interpretation not be “plainly erroneous or inconsistent with the regulation.”¹⁶³

2. “Plain Meaning and Structural Issues”

An essential aspect of the doctrine of judicial deference is the principle that a court will not substitute its own construction of a statute for one made by the administering agency.¹⁶⁴ The agency’s interpretation does not have to be the “best” one, nor the one the court would have chosen. It simply has to be permissible, reasonable, or somehow persuasive (depending on the level of deference granted). In other words, if a court finds that deference to the agency’s proffered interpretation is warranted, there is no need for the court to examine conflicting interpretations to determine which is the “best” because to do so renders deference analysis virtually meaningless.¹⁶⁵ Yet that is exactly what the court proceeds to do, under the guise of examining “Plain Meaning and Structural Issues.”¹⁶⁶

The court analyzes the statutory text and structure to determine which of the “competing interpretations” of section 303(d)(1)(A) offered by the plaintiffs and the EPA is the better one. The court frames the analysis less than perfectly. Rather than comparing the competing interpretations to each other and the statute, the court should have simply compared the EPA’s interpretation to the statute. The plaintiffs’ preferred interpretation is irrelevant in a deference analysis; once the court has found that the statute is ambiguous, the only remaining task is to determine whether the *agency’s* interpretation is reasonable (*Chevron*) or persuasive (*Skidmore*). For a reviewing court to find that the agency’s interpretation is reasonable or persuasive, and then rule that the plaintiffs’ interpretation is the better one and should be law, is to substitute its judgment for that of the agency—exactly the kind of judicial interference in the legislative and executive domains that the deference doctrine was developed to

¹⁶³ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

¹⁶⁴ *E.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

¹⁶⁵ *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (“The [majority] implies that courts may substitute their interpretation of a statute for that of an agency whenever, ‘[e]mploying traditional tools of statutory construction,’ they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue.”) (internal citation omitted).

¹⁶⁶ *Pronsolino (II)*, 291 F.3d at 1135.

avoid.¹⁶⁷ Surely, allowing citizens to have authority to interpret a statute equivalent to the authority possessed by the statute's administering agency would require an extraordinarily clear statement of intent from Congress.

During this discussion, the court implies several times that the EPA's construction of the statute is a permissible one.¹⁶⁸ Under *Chevron* or *Seminole Rock*, this alone would be enough for the court to uphold the interpretation. Even under *Skidmore*, the court had already found that the EPA's interpretation was due "substantial" deference¹⁶⁹—a finding that makes comparison of the competing interpretations superfluous. It is difficult to imagine the court determining that the EPA's interpretation was permissible, yet still ruling that the plaintiffs' interpretation was better and should be the law.

This is not to say that the court's textual and structural analysis, at least with respect to EPA's interpretation, is in itself flawed. It does, in fact, buttress the court's *de facto* *Seminole Rock* deference by concluding that the EPA's interpretation is "entirely reasonable."¹⁷⁰ The analysis is merely unnecessary.

3. "Federalism Concerns"

The plaintiffs' final argument was that the EPA was seeking to regulate local land use, which is considered to be a state function, in violation of the Constitution's federalism principles.¹⁷¹ As noted above, the court dismissed this argument because the CWA does not give the EPA the authority to require states to implement or enforce section 303 plans.¹⁷²

The court's reasoning is correct, at least to a point. However, the EPA is capable of making life difficult for states that drag their heels on TMDL implementation and enforcement. In addition to the ability to withdraw section 208 and section 319 funds, the EPA has at least three other "unstated authorities" (as Professor Oliver Houck calls them): (1) it may deny new NPDES permits in water quality-limited streams; (2) it may modify permits for existing sources; and (3) it may revoke the state's

¹⁶⁷ See *Chevron*, 467 U.S. at 865-66 (quoted *supra* n. 147).

¹⁶⁸ For example: "Whether or not the [plaintiffs'] suggested interpretation is entirely implausible, it is at least considerably weaker than the EPA's competing construction." 291 F.3d at 1135. "If 'stringent' means 'thoroughgoing,' however [one of the definitions cited from the *Oxford English Dictionary Online*], § 303(d)(1)(A) would encompass the EPA's broader reading of the statute." *Id.* at 1136 n.14.

¹⁶⁹ *Id.* at 1134-35.

¹⁷⁰ *Id.* at 1139.

¹⁷¹ Reply Br. of Pl.'s-Appellants at *14, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

¹⁷² *Pronsolino (II)*, 291 F.3d at 1140.

authority to administer its own program – an extreme sanction that Professor Houck refers to as a “gorilla in the closet.”¹⁷³ By bringing these authorities to bear on a state, the EPA could indirectly influence land use decisions.

Nonetheless, the plaintiffs’ “Hail Mary” federalism argument does not deserve serious consideration for the straightforward reason that under the CWA the EPA simply does not have any authority to make land use decisions. The federal government seeks only to ensure that the waters under its jurisdiction are sufficiently clean. It is up to the states to determine how that goal is accomplished. Here, California determined that the goal would best be accomplished by restrictions on timber harvesting practices. It should also be remembered that the plaintiffs were not, in fact, forbidden to use their land for timber harvesting. The complaint that the EPA was excessively intruding on the state domain of land use rings hollow and accordingly was not exhaustively addressed by the court.

C. Prospects for a Similar Decision in the Fifth and Eleventh Circuits

The question of whether water bodies polluted only by nonpoint sources are subject to TMDLs has not been decided by federal circuit courts of appeals other than the Ninth. The question could be of importance in Mississippi and Alabama because both states have significant agriculture and timber industries, which are two of the major contributors to nonpoint source pollution. *Pronsolino*, a Ninth Circuit decision, is not binding precedent in Mississippi, which is in the Fifth Circuit, or Alabama, which is in the Eleventh Circuit. Thus, the Fifth and Eleventh circuits, if presented with the question of whether section 303(d) applies to nonpoint source-only waters, could rule either way. An examination of past decisions may provide clues as to which way each court might go.

The foundation of the Ninth Circuit’s decision is the deference analysis, so the following discussion will focus on that reasoning. To recap, the Ninth Circuit deferred to the EPA’s interpretation because (1) the EPA has delegated regulatory authority under the CWA, and (2) the EPA had not made any statements inconsistent with its asserted interpretation. As noted, this is essentially *Seminole Rock* deference. According to *Mead*,

¹⁷³ Oliver Houck, *TMDLs III: A New Framework for the Clean Water Act’s Ambient Standards Program*, 28 ENVTL. L. REP. 10415 (1998).

however, the proper deference level for the EPA's section 303 interpretation is *Skidmore* (which requires the interpretation to be not only permissible but persuasive). Thus, cases utilizing *Skidmore* will be considered.

1. The Fifth Circuit

Based on precedent, it is likely, if not certain, that the Fifth Circuit Court of Appeals would uphold the EPA's interpretation if a fact situation similar to that in *Pronsolino* presented itself.

In *Pension Benefit Guaranty Corp. v. Wilson N. Jones Memorial Hospital*,¹⁷⁴ an employer challenged the interpretation of an ambiguous regulatory term by the Pension Benefit Guaranty Corporation (PBGC), which is a federal government corporation that regulates pension plan terminations. The District Court upheld the interpretation as reasonable under *Chevron*,¹⁷⁵ but the Fifth Circuit correctly determined that *Mead* dictated application of the less deferential *Skidmore* standard. Nonetheless, the court upheld the interpretation. The court found PBGC's interpretation persuasive because (1) it was consistent with previous interpretations, (2) it was logical, and (3) the interpretation was made by an expert agency acting within its statutory mandate after a thorough review of the facts.¹⁷⁶

In *Louisiana Environmental Action Network v. U.S. Environmental Protection Agency*,¹⁷⁷ an environmental organization challenged the EPA's interpretation of the Clean Air Act, which the agency made in accordance with "General Preamble" guidance that it issued without notice and comment. The court found the agency's interpretation persuasive under *Skidmore* because (1) it comported with a "primary purpose" of the statute, and (2) it was logical.¹⁷⁸

In *In re Dengel*,¹⁷⁹ a trustee in bankruptcy challenged the U.S. Trustee's interpretation of a statute concerning a method of calculating fees. The interpretation had been promulgated in a policy handbook. The court applied *Skidmore* and upheld the interpretation. The court was persuaded because (1) the purpose of the U.S. Trustee's policy comported with the legislative history

¹⁷⁴ 374 F.3d 362 (5th Cir. 2004).

¹⁷⁵ *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 250 F. Supp. 2d 676 (E.D. Tex. 2003).

¹⁷⁶ 374 F.3d at 370.

¹⁷⁷ 382 F.3d 575 (5th Cir. 2004).

¹⁷⁸ *Id.* at 583-84.

¹⁷⁹ 340 F.3d 300 (5th Cir. 2003).

of the statute, and (2) the statute did not prohibit the interpretation.¹⁸⁰

In *Washington v. HCA Health Services of Texas, Inc.*,¹⁸¹ a terminated employee challenged his termination on the ground that, under the Americans with Disabilities Act (ADA), his status as “disabled” should be determined based on his un-medicated state rather than his medicated state. The court acknowledged that the ADA was ambiguous on the issue, and seeking guidance as to the correct interpretation, deferred to the Equal Employment Opportunity Commission’s Interpretive Guidelines (EEOC Guidelines).¹⁸² This case differs from the others because the plaintiff was not directly challenging the agency interpretation; rather, the court was choosing the agency’s interpretation for guidance to the meaning of an ambiguous statute. However, the court cited *Skidmore* for the proposition that agency interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁸³ The court found the EEOC Guidelines worthy of deference because (1) the Guidelines had been part of the EEOC’s regulations since the regulations were promulgated, (2) the EEOC’s interpretation had been consistent, (3) the legislative history supported the EEOC’s interpretation, and (4) the EEOC has “significant expertise and authority to interpret and promulgate regulations under the ADA.”¹⁸⁴

These cases exhibit the Fifth Circuit’s tendency to be deferential to agencies when applying *Skidmore*.¹⁸⁵ The factors that have persuaded the court may be summarized as follows: consistency with previous interpretations of the ambiguity; consistency with legislative history; consistency with a primary purpose of the statute; agency expertise and authority; and/or logic. Application of these factors to the EPA’s interpretation of section 303 in a *Pronsolino*-like fact situation does not have a clearly predetermined outcome. Yet to the extent that the factors favor one outcome over the other, they favor upholding the EPA.

First, as the Ninth Circuit pointed out, the EPA has not interpreted section 303 inconsistently. As stated above, this is not

¹⁸⁰ *Id.* at 310.

¹⁸¹ 152 F.3d 464 (5th Cir. 1998), *vacated on other grounds* by 199 F.3d 192 (5th Cir. 1999).

¹⁸² *Id.* at 470.

¹⁸³ *Id.* (quoting *Skidmore*, 323 U.S. at 140).

¹⁸⁴ *Id.*

¹⁸⁵ The Fifth Circuit has purported to apply *Skidmore* in two other cases in which the agency interpretation was overruled: *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641 (5th Cir. 2004) and *Moore v. Hannon Food Svc., Inc.*, 317 F.3d 489 (5th Cir. 2003). However, these cases are not considered here. In *Spector*, the court misapplies the analysis. In *Moore*, the court fails to apply the analysis at all.

necessarily the same as interpreting it consistently, and should not have been particularly strong evidence in the EPA's favor in *Pronsolino*. However, if a similar situation arises in the Fifth Circuit, then the EPA will be able to argue that its decision to apply section 303 to nonpoint source-only waters is consistent with the action it took on the Garcia River that was upheld by the Ninth Circuit. Thus, the "consistency" factor would favor the EPA.

Second, the legislative history is inconclusive about whether Congress intended section 303 to cover nonpoint source-only waters. This fact was acknowledged by both the district court and the Ninth Circuit in the *Pronsolino* case.¹⁸⁶ For this reason the CWA's legislative history should not be an important factor.

Third, the EPA's interpretation comports with the primary purposes of the CWA, which are found in CWA section 101 and include (1) "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," (2) eliminating the discharge of pollutants into U.S. waters, (3) achieving water quality standards, and (4) developing and implementing programs for the control of nonpoint sources of pollution in an expeditious manner.¹⁸⁷ This factor weighs very heavily in the EPA's favor.

Fourth, agency expertise and authority works in the EPA's favor. It has been noted above that the agency's technical expertise is not generally in the realm of determining jurisdiction.¹⁸⁸ However, the agency undeniably has the delegated authority to administer the CWA. This is a factor to which the Fifth Circuit gave weight in both *Pension Benefit Guaranty Corp.* and *HCA Health Services*. It stands to reason that the court would follow similar reasoning here.

Finally, the EPA's interpretation of section 303 is logical. Logic, of course, may be in the eye of the beholder, but it would be difficult to argue persuasively that Congress intended for maximum pollutant loads to be defined for some water bodies that fail to meet water quality standards, but not for others. A water body is listed in section 303(d) because it violates water quality standards; the characterization of the pollution source as point or nonpoint has no logical relationship to the violation. Anthropomorphizing the water body makes the point clear: the water does not care from where its pollutants came, it cares only that it is polluted. By the light of the CWA's explicit objective "to restore and maintain the chemical, physical, and biological

¹⁸⁶ *Pronsolino (I)*, 91 F. Supp. 2d 1337, 1349-51 (N.D. Cal. 2000); *Pronsolino (II)*, 291 F.3d 1123, 1139 (9th Cir. 2002).

¹⁸⁷ 33 U.S.C. § 1251(a)(1), (2), (7).

¹⁸⁸ See *supra* note 154 and accompanying text.

integrity of the Nation's waters,"¹⁸⁹ it is far less logical to argue that Congress intended for nonpoint source-only waters to escape the TMDL process than to argue that it did not.

2. The Eleventh Circuit

Based on precedent, the Eleventh Circuit is less likely than the Fifth to defer to an agency interpretation based on a *Skidmore* analysis. In none of the following cases in which *Skidmore* is followed does the court defer to the agency's proposed interpretation.

In *Arriaga v. Florida Pacific Farms, L.L.C.*,¹⁹⁰ the circuit court's only post-*Mead* case to utilize *Skidmore*, the court chooses not to defer to opinion letters from the U.S. Department of Labor that interpreted a statutory phrase. The court allowed that the agency's interpretation had been consistent in multiple opinion letters over the years, but pointed out that the first such letter did not explain the agency's reasoning and the later letters simply followed the first.¹⁹¹ Consistency alone, without a foundation of articulated reasoning, was not enough to satisfy the court.

In *Securities and Exchange Commission v. Adler*,¹⁹² the court rejected a Securities and Exchange Commission (SEC) interpretation that was offered in a non-binding "report of investigation" because (1) the interpretation was inconsistent with the agency's position in previous instances, and (2) the agency had "ample opportunity" to adopt its interpretation in a formal rulemaking, but had not done so.¹⁹³

In *Miree Construction Corp. v. Dole*,¹⁹⁴ the court elected not to defer to a decision by the Wage Appeals Board of the U.S. Department of Labor. Again, the court's primary concern seemed to be consistency. The court, following *Skidmore*, declared that "an agency decision is more likely to be entitled to deference if it is a 'long-standing, clearly articulated interpretation of the statute.'"¹⁹⁵ Those characteristics were absent from the interpretation in question.

¹⁸⁹ 33 U.S.C. § 1251(a) (2000).

¹⁹⁰ 305 F.3d 1228 (11th Cir. 2002).

¹⁹¹ *Id.* at 1238-39.

¹⁹² 137 F.3d 1325 (11th Cir. 1998).

¹⁹³ *Id.* at 1339.

¹⁹⁴ 930 F.2d 1536 (11th Cir. 1991).

¹⁹⁵ *Id.* at 1541 (quoting *Fed. Maritime Comm'n. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

In *Frank Diehl Farms v. Secretary of Labor*,¹⁹⁶ the court heard a challenge to a statutory interpretation that had been made by the Occupational Health and Safety Review Commission and the Secretary of Labor in an administrative order. The court determined that the interpretation was not entitled to deference under *Skidmore* because (1) it was not made contemporaneously with the original legislation, (2) it was inconsistent with previous interpretations, and (3) it “did not involve a technical matter, but rather involved a statutory construction well within the courts’ expertise.”¹⁹⁷

These cases show that the Eleventh Circuit is wary of deferring to agency interpretations of statutory ambiguities, although it will consider various factors in accordance with *Skidmore*. Factors that the court considered in these cases included: consistency with previous interpretations; clear articulation of the reasoning supporting the interpretation; whether the agency had had the opportunity to advance its interpretation by formal rulemaking; whether the agency’s interpretation was made contemporaneously with the original legislation; and whether the interpretation involved a technical matter.

In a *Pronsolino*-type situation in the Eleventh Circuit, the consistency factor should weigh slightly in the EPA’s favor, as explained in the Fifth Circuit discussion above. Likewise, the EPA has articulated its reasoning for interpreting section 303(d) as encompassing nonpoint source-only waters, for example in the preamble to the proposed TMDL rule.¹⁹⁸ That factor is also likely to work to the EPA’s advantage.

The remaining factors weigh against the EPA. The EPA had, and took, the opportunity to advance its interpretation of section 303(d) by formal rulemaking with the proposed TMDL rule. The fact that the EPA withdrew the proposed rule before it could go into effect could be read as a lack of agency confidence in the interpretation, although it appears that the withdrawal was motivated as much by public controversy as by agency reconsideration.¹⁹⁹ Either way, the agency had the opportunity to clarify its interpretation of section 303(d) in its regulations, yet failed to complete the formal rule-making process.

¹⁹⁶ 696 F.2d 1325 (11th Cir. 1983).

¹⁹⁷ *Id.* at 1329-30.

¹⁹⁸ See *supra* note 62; see also Persciasepe, *supra* note 145.

¹⁹⁹ Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. at 13,608-12 (Mar. 19, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

Further, the EPA interpretation was not made contemporaneously with the original legislation. The CWA was enacted in 1972; the EPA's first CWA regulations did not appear until 1978.²⁰⁰

Finally, interpreting whether section 303(d) should include nonpoint source-only waters does not involve a technical matter.²⁰¹ It is a matter of statutory construction, which a court is no less qualified to make than the agency charged with administering the statute.

Based on the court's tendency not to defer to agency interpretations under *Skidmore*, and on the factors that the court has considered important in the past, it is not likely that the Eleventh Circuit would rule in the EPA's favor if presented with a case like *Pronsolino*.

V. CONCLUSION

If cases like *Pronsolino*, contesting the applicability of section 303(d) to nonpoint source-only waters, were to be brought in Mississippi and Alabama today, it appears that the results would be split. In Mississippi, which is in the Fifth Circuit, precedent indicates that the courts would uphold the EPA's interpretation. In Alabama, part of the Eleventh Circuit, the courts probably would reject the EPA's interpretation.

Clean water advocates in Mississippi and Alabama should consider these possibilities as they work for further improvement in the states' nonpoint source-impaired water bodies. From a legal standpoint, section 303(d) may not be the most appropriate tool for this very important job. For the time being, achieving water quality standards in *all* the waters of the U.S.—not just those affected by point sources—may be most effectively pursued by focusing on efforts under sections 208 and 319 and tougher state laws.

²⁰⁰ See *Pronsolino (II)*, 291 F.3d at 1133.

²⁰¹ See *supra* note 154 and accompanying text.