Pronsolino v. Nastri

-- F.3d ---

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Appeal from the United States District Court for the Northern District of California; William H. Alsup, District Judge, Presiding. D.C. No. CV-99-01828- WHA.
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OPINION

BERZON, Circuit Judge.

*1 The United States Environmental Protection Agency ("EPA") required California to identify the Garcia River as a water body with insufficient pollution controls and, as required for waters so identified, to set so-called "total maximum daily loads" (**"TMDLs"**)--the significance of which we explain later--for pollution entering the river. Appellants challenge the EPA's authority under the Clean Water Act ("CWA" or the "Act") § 303(d), 33 U.S.C. § 1313(d), to apply the pertinent identification and **TMDL** requirements to the Garcia River. The district court rejected this challenge, and we do as well.

CWA 303(d) requires the states to identify and compile a list of waters for which certain effluent limitations are not stringent enough to implement the applicable water quality standards for such waters. 303(d)(1)(A). Effluent limitations pertain only to point sources of pollution; point sources of pollution are those from a discrete conveyance, such as a pipe or tunnel. Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source. The Garcia River is polluted only by nonpoint sources. Therefore, neither the effluent limitations referenced in 303(d) nor any other effluent limitations apply to the pollutants entering the Garcia River.

The precise statutory question before us is whether the phrase are not stringent enough triggers the identification requirement both for waters as to which effluent limitations apply but do not suffice to attain water quality standards and for waters as to which effluent limitations do not apply at all to the pollution sources impairing the water. We answer this question in the affirmative, a conclusion which triggers the application of the statutory **TMDL** requirement to waters such as the Garcia River.

I. STATUTORY BACKGROUND

Resolution of the statutory interpretation question before us, discrete though it is, requires a familiarity with the history, the structure, and, alas, the jargon of the federal water pollution laws. *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir .1990). We therefore begin with a brief overview of the Act.

A. The Major Goals and Concepts of the CWA

Congress enacted the CWA in 1972, amending earlier federal water pollution laws that had proven ineffective. EPA v. California, 426 U.S. 200, 202 (1976). Prior to 1972, federal water pollution laws

relied on "water quality standards specifying the acceptable levels of pollution in a States interstate navigable waters as the primary mechanism ... for the control of water pollution. *Id.* The pre-1972 laws did not, however, provide concrete direction concerning how those standards were to be met in the foreseeable future.

In enacting sweeping revisions to the nation's water pollution laws in 1972, Congress began from the premise that the focus on the tolerable effects rather than the preventable causes of pollution constituted a major shortcoming in the pre 1972 laws. *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir.1998) (quoting *EPA v. State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976)). The 1972 Act therefore sought to target primarily the preventable causes of pollution, by emphasizing the use of technological controls. *Id.*; *Oregon Natural Res. Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir.1987).

*2 At the same time, Congress decidedly did *not* in 1972 give up on the broader goal of attaining acceptable water quality. CWA § 101(a), 33 U.S.C. § 1251(a). Rather, the new statute recognized that even with the application of the mandated technological controls on point source discharges, water bodies still might not meet state-set water quality standards, *Natural Res. Def. Council*, 915 F.2d at 1316-17, and therefore put in place mechanisms other than direct federal regulation of point sources designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 101(a).

In so doing, the CWA uses distinctly different methods to control pollution released from point sources and those that are traceable to nonpoint sources. *Oregon Natural Res. Council*, 834 F.2d at 849. The Act directly mandates technological controls to limit the pollution point sources may discharge into a body of water. *Dombeck*, 172 F.3d at 1096. On the other hand, the Act "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," *id.* at 1907 (citations omitted), thereby "recogniz [ing], preserv [ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources ...." § 101(b).

B. The Structure of CWA 303, 33 U.S.C. 1313

1. *Water Quality Standards*

Section 303 is central to the Act's carrot-and-stick approach to attaining acceptable water quality without direct federal regulation of nonpoint sources of pollution. Entitled Water Quality Standards and Implementation Plans, the provision begins by spelling out the statutory requirements for water quality standards: "Water quality standards" specify a water body's "designated uses" and "water quality criteria," taking into account the water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes ...." 303(c)(2). The states are required to set water quality standards for *all* waters within their boundaries regardless of the sources of the pollution entering the waters. If a state does not set water quality standards, or the EPA determines that the state's standards do not meet the requirements of the Act, the EPA promulgates standards for the state. §§ 303(b), (c)(3)-(4).

2. *Section 303(d): "Identification of Areas with Insufficient Controls; Maximum Daily Load"* [FN1]

FN1. The complete text of sections 303(d)(1)(A) and (C) reads:

(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The 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.

enough" or "adequate" or "sufficient"; [FN14] (2) reading the phrase "not stringent enough" in isolation, rather than with reference to the stated goal of implementing "any water quality standard applicable to such waters." Where the answer to the question "not stringent enough for what?" is "to implement any [applicable] water quality standard," the meaning of "stringent" should be determined by looking forward to the broad goal to be attained, not backwards at the inadequate effluent limitations. One might comment, for example, about a teacher that her standards requiring good spelling were not stringent enough to assure good writing, as her students still used bad grammar and poor logic. Based on the language of the contested phrase alone, then, the more sensible conclusion is that the § 303(d)(1) list must contain any waters for which the particular effluent limitations will not be adequate to attain the statute's water quality goals.

FN14. Stringent means "rigorous, strict, thoroughgoing; rigorously binding or coercive." *Oxford English Dictionary Online* (2001). Defining "stringent" as "rigorous" or "strict" would lend support to the Pronsolinos' interpretation. If "stringent" means "thoroughgoing," however, § 303(d)(1)(A) would encompass the EPA's broader reading of the statute. Also, "stringent enough" may have a slightly different meaning from "stringent" standing alone, such as "adequate" or "sufficient." *See* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 792 (1973) (*Legislative History*) (H.R. Rep. 92-911 to accompany H.R. 11896 (March 11, 1972)) (using the term "are inadequate" in place of "not

stringent enough.").

Placing the phrase in its statutory context supports this conclusion. Section 303(d) begins with the requirement that each state identify those waters within its boundaries.... § 303(d)(1)(A). So the statute's starting point for the listing project is a compilation of each and every navigable water within the state. Then, only those waters that will attain water quality standards after application of the new point source technology are excluded from the § 303(d)(1) list, leaving all those waters for which that technology will not "implement any water quality standard applicable to such waters." § 303(d)(1)(A); *see American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir.2001) ("[E]ach state is required to identify all of the waters within its borders not meeting water quality standards and establish **[TMDLs]** for those waters.") (citing § 303(d)); *Pronsolino*, 91 F.Supp.2d at 1347. The alternative construction, in contrast, would begin with a subset of all the state's waterways, those that have point sources subject to effluent limitations, and would result in a list containing only a subset of that subset--those waters as to which the applicable effluent limitations are not adequate to attain water quality standards.

***11** **[5]** The Pronsolinos' contention to the contrary notwithstanding, no such odd reading of the statute is necessary in order to give meaning to the phrase "for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] ... are not stringent enough." The EPA interprets § 303(d)(1)(A) to require the identification of any waters not meeting water quality standards only if specified effluent limitations would not achieve those standards. 40 C.F.R. § 130.2 (j). If the pertinent effluent limitations would, if implemented, achieve the water quality standards but are not in place yet, there need be no listing and no **TMDL** calculation. *Id.*

So construed, the meaning of the statute is different than it would be were the language recast to state only that "Each State shall identify those waters within its boundaries ... [not meeting] any water quality standard applicable to such waters." Under the EPA's construction, the reference to effluent limitations reflects Congress' intent that the EPA focus initially on implementing effluent limitations

and only later avert its attention to water quality standards. *See e.g.*, 1 *Legislative History* 171(The Administrator should assign secondary priority to [303] to the extent limited manpower and funding may require a choice between a water quality standards process and early and effective implementation of the effluent limitation-permit program. (statement of Sen. Muskie, principal author of the CWA and the Chair of the Senate's Public Works Committee)); *see also Environmental Def. Fund, Inc. v. Costle*, 657 F.2d 275, 279 (D.C.Cir.1981) (The 1972 CWA "assigned secondary priority to the[water quality] standards and placed primary emphasis upon both a point source discharge permit program and federal technology-based effluent limitations...."). [FN15]

FN15. The district court expressed the same point differently: "The 1972 Act superimposed the technology-driven mandate of point-source effluent limitations. To assess the impact of the new strategy on the monumental clean-up task facing the nation, Congress called for a list of the unfinished business expected to remain even after application of the new cleanup strategy." *Pronsolino*, 91 F.Supp.2d at 1347.

Given all these language considerations, it is not surprising that the only time this court addressed the reach of § 303(d)(1)(A), it rejected a reading of § 303(d)(1)(A) similar to the one the Pronsolinos now proffer. In *Dioxin*, 57 F.3d at 1526-27, the plaintiffs argued that the phrase "not stringent enough" prohibited the EPA from listing under § 303(d)(1)(A) and establishing **TMDLs** for toxic pollutants, until after the implementation and proven failure of § 301(b)(1)(A) "best practicable technology" effluent limitations. Toxic pollutants, however, are not subject to "best practical technology" controls, [FN16] but to more demanding "best available technology," precisely because of their toxicity. *Id.*

FN16. Nor did the effluent limitations required by § 301(b)(1)(B) apply to the pollutants at issue.

The court in *Dioxin* held that the EPA acted within its statutory authority in setting **TMDLs** for toxic pollutants, even though the effluent limitations referenced by § 303(d)(1)(A) did not apply to those pollutants. *Id.* at 1528. The court explained that, since best practical technology effluent limitations do not apply to toxic pollutants, those limitations are, as a matter of law, "not stringent enough" to achieve water quality standards. *Id.* In other words, *Dioxin* read § 303(d)(1)(A) as applying to all waters in the state, not only to the subset covered by certain kinds of effluent controls, and it understood "not stringent enough" to mean" "not adequate for" or "inapplicable to."

***12** Nothing in § 303(d)(1)(A) distinguishes the treatment of point sources and nonpoint sources as such; the only reference is to the "effluent limitations required by" § 301(b)(1). So if the effluent limitations required by § 301(b)(1) are "as a matter of law" "not stringent enough" to achieve the applicable water quality standards for waters impaired by point sources not subject to those requirements, then they are also "not stringent enough" to achieve applicable water quality standards for other waters not subject to those requirements, in this instance because they are impacted only by nonpoint sources. Additionally, the *Dioxin* court, applying *Chevron* deference, upheld the EPA's interpretation of § 303(d) "as requiring **TMDLs** where existing pollution controls will not lead to attainment of water standards," *id.* at 1527; *see also* 40 C.F.R. § 130.7(b), a holding that directly encompasses waters polluted by nonpoint sources.

3. *The Statutory Scheme as a Whole*

The Pronsolinos' objection to this view of § 303(d), and of *Dioxin*, is, in essence, that the CWA as a

4 major issues

. . .

1. WATCH LIST: Narrow . . . .
2. Bionomial model:
3. Subjective info, . . .
4. what is the effect of listing . . . . .
   A. [illegible] Net in Rely
   B. Cast net narrowly.

* We intend 2002 not to be precedent setting.