INSIDE

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IN FUTURE ISSUES

D.C. Circuit rules USDA violated 1985 Food Security Act and APA procedures in implementation of sugar program

The United States Court of Appeals for the District of Columbia Circuit has ruled that the USDA Secretary violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, when it announced by press release, without notice and comment, a new payment-in-kind ("PIK") program for the 2001 sugar crop. *Sugar Cane Growers Co-op of Florida v. Veneman,* 289 F.3d 89 (D.C. Cir. 2002). The D.C. Circuit also ruled that the USDA's failure to comply with the APA was not harmless error, and that the Secretary violated the Food Security Act of 1985 ("FSA"), 7 U.S.C. § 1308a, in its implementation of the PIK program. *Id.* In addition, the D.C. Circuit reversed the district court's holding that the plaintiffs lacked standing to bring the action. *Id.* The D.C. Circuit did not vacate the Department's action, but rather remanded the matter to the USDA for further consideration. *Id.*

The Secretary has authority to implement a PIK program for sugar under the FSA of 1985. *Id.* at 91. The Secretary announced in an August 31, 2001, press release that it was implementing a PIK program for the 2001 sugar crop. *Id.* at 92. The press release indicated that the program was being implemented without notice and comment. *Id.* The Secretary also implemented a sugar program for the 2000 sugar crop without notice and comment. Neither the 2000 sugar program, nor the Secretary's decision to proceed without notice and comment, was challenged at the time it was implemented.[1] Prior to announcing the 2001 PIK program, the USDA met several times with interested persons to discuss the possibility of implementing the program. *Id.* These meetings were informal, and were not part of any formal rulemaking process. *Id.*

Sugar Cane Growers Cooperative of Florida, Florida Crystals Corporation, and Refined Sugars, Inc. brought an action against the Secretary, arguing that announcing the 2001 PIK program by press release, without notice and comment, violated APA requirements for notice and comment rulemaking procedures; violated the FSA of 1985 when the Secretary did not make findings required by the FSA of 1985; and violated the Regulatory Flexibility Act when it failed to consider the affect of the program on small businesses. *Id.* The plaintiffs also contended that the 2000 and 2001 sugar programs caused them two injuries because it gave PIK program participants a "competitive advantage [relative to non-program participants] by providing them with below-harvest-cost sugar," and because the program caused sugar prices to decrease. *Id.* The court did not discuss the claim brought under the

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Farmer's conviction for falsifying FSA loan applications and bribery reversed by Fifth Circuit

The United States Court of Appeals for the Fifth Circuit has reversed a jury verdict entered by the United States District Court for the Southern District of Mississippi that found that a Mississippi farmer was guilty of bribery and knowingly making false statements on farm loan applications. *United States v. Hart*, No. 01-60304, 2002 WL 1285810 (5th Cir. 2002). The Fifth Circuit ruled that the district court abused its discretion when it allowed a government witness to testify about the debts the farmer allegedly should have reported on his loan applications. *Id.* The Fifth Circuit also ruled that without the government witness's testimony, the remaining evidence was insufficient to prove the farmer's guilt beyond a reasonable doubt. *Id.*

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Regulatory Flexibility Act because the appellants failed to raise the claim on appeal. See *Id.* at *8, n.3.

The district court ruled that the plaintiffs lacked standing because they had not shown an injury-in-fact, and because they failed to establish causation when "they had not demonstrated that the Department would have decided against implementing the program following notice and comment." *Id.* at 93. Although the case was dismissed for lack of standing, the district court also decided that "the 2001 PIK program was a rule subject to notice-and-comment procedures, but the Department's failure to comply with those procedures was harmless." *Id.*

The D.C. Circuit was not persuaded by the plaintiffs' argument that 2000 and 2001 PIK program participants enjoyed below-harvest-cost sugar, thereby allowing participants a competitive advantage. *Id.* at 93. However, the court was convinced that the plaintiffs made a prima facie showing that they had standing because the PIK program "had a depressive effect on sugar prices–which would have clearly injured [plaintiffs]." *Id.* The plaintiffs presented two economic studies by independent industry analysts to help substantiate this injury claim. *Id.* For instance, one of the analysts concluded that the PIK program "resulted in 'a substantial amount of yield slippage' which meant more sugar on the market and thereby depressed [sugar] prices." *Id.*

The Secretary responded that the plaintiffs could not have suffered this injury because overall sugar prices actually increased, instead of decreased. *Id.* The circuit court disagreed, commenting that this contention was "a snare because the relevant question is not whether sugar prices actually went up or down but whether the PIK program had a depressive effect [on sugar prices]." *Id.* The court attributed the increase in sugar prices to external market factors that caused the sugar supply to decrease. *Id.* The D.C. Circuit added, "Since the appellants presented a prima facie claim of injury based on basic economic logic (as set forth in the contested affidavits and studies), it was the government's burden, if it wanted a trial on the question of sugar price movements, to seek a factual hearing. Because it did not, we think appellants established injury." *Id.* at 94.

The D.C. Circuit dismissed the district court's alternative holding that the Secretary was excused from its failure to abide by notice-and-comment procedures. *Id.* The court remarked, "A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result." *Id.* at 94-95. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992)(finding that an individual living next to a federally licensed dam 'has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered.'")). Finally, the court stated, "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, [5 U.S.C.] § 553 would be a dead letter." *Id.*

The Secretary argued on appeal that its failure to engage in notice-and-comment rulemaking was not necessary because the PIK program announcement

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The district court's conviction was vacated, and the matter was remanded for a new trial. *Id.*

Rodalton Hart lived and farmed in Holmes County, Mississippi for most of his life. *Id.* His brothers, Larry, Chester, and Cleveland, were also involved in farming. *Id.* Rodalton and his brothers formed five farm partnerships in 1993, so that they could manage their farming operations more efficiently. *Id.* The partnerships required financial assistance in 1997 and 1998. *Id.* The Hart brothers submitted applications to the Farm Service Agency ("FSA") for financial assistance in each of these years. *Id.*

The brothers worked with their local FSA agent, Orlando Kilcrease, for several months to prepare these loan applications. *Id.* The applications required disclosure of the partnerships' debts, liabilities, expenses, and income projections. *Id.* Rodalton signed the applications on behalf of the partnerships and submitted them to the FSA office. *Id.*

Kilcrease used the information provided on the applications to create a "Farm and Home Plan" ("FHP") for each of the partnerships. *Id.* at *2. The FHP is "a computer generated 'projection that accurately reflects the borrowers' plan of operation for the production or market cycle.'" *Id.* at *2 (quoting 7 C.F.R. § 1924.54). The FHP's basic purpose is to show that the farmer applying for the FSA loan expects a positive cash flow for the projected crop year. *Id.* (citing 7 C.F.R. § 1924.56). Rodalton and his brothers signed the FHPs and submitted them to the FSA. *Id.*

The government subsequently began investigating the Hart brothers' farm partnerships. *Id.* The investigation resulted in a 1999 grand jury indictment, in which Rodalton, Cleveland, and Larry were charged with "engaging in a conspiracy to defraud the government and making false statements to the government in the 1997 and 1998 FHPs." *Id.* In addition, Cleveland was charged with disposing of property that had been pledged to the FSA, and Rodalton was charged with bribing a FSA official. *Id.*

At trial, the jury found Cleveland, Larry, and Rodalton not guilty of conspiracy to defraud the government. *Id.* Larry and Cleveland were also found not guilty on all other charges that had been brought against them. *Id.* However, Rodalton was found guilty of "knowingly making material false statements to the FSA in 1997 and 1998 for the purpose of influencing the grant of loans, in violation of [18 U.S.C.] § 1014, and of corruptly giving $1,000.00 to a public official with the intent to influence the official to

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"was really not a rule" requiring notice-and-comment under the APA. *Id.* at 96 (see 5 U.S.C. § 551(4)). The Secretary argued that the PIK program announcement was not a rule because it was an "isolated agency act" not affecting later USDA acts and because it had "no future effect on any other party before the agency." *Id.* at 95-96 (quoting *Daingerfield Island Protective Soc'y v. Babbitt,* 823 F.Supp. 950, 957 (D.D.C. 1993), *aff'd in relevant part*, 15 F.3d 1159 (D.C. Cir. 1993)). The D.C. Circuit considered the initial press release announcing the program, the subsequent notice of the program's implementation appearing in the *Federal Register*, and the fact that the program included sanctions to be imposed on participants for certain violations, to support its conclusion that the agency's action was clearly a rule that should have been subject to notice-and-comment rulemaking procedures. *Id.* at 96.

In addition to its earlier argument that its failure to provide notice-and-comment rulemaking was excused, the Secretary also argued that its failure to resort to notice-and-comment rulemaking was a harmless error. *Id.* The Secretary specifically argued that the Department's error was harmless because plaintiffs were unable to present arguments that they would have raised through formal notice-and-comment procedures that they did not raise in the informal meetings. *Id.*

The D.C. Circuit acknowledged that technical APA errors can sometimes be harmless. *Id.* (citing *Sheppard v. Sullivan,* 906 F.2d 756 (D.C. Cir. 1990)). However, "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Id.* (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988). The court stated that if the Secretary's argument were law, its effect would be to preclude judicial review of an agency decision any time there has been some form of informal consultation, and the plaintiffs were not able to raise any arguments in addition to those raised during an informal consultation. *Id.* The court added, "The government could avoid the necessity of publishing a notice of a proposed rule and perhaps, most important, would not be obliged to set forth a statement of the basis and purpose of the rule, which needs to take account of the major comments–and often is a major focus of judicial review." *Id.*

The D.C. Circuit agreed with the plaintiffs' contention that the Secretary violated the FSA of 1985 when it failed to make four required findings before implementing the PIK program. *Id.* at 97. The USDA argued that it satisfied the FSA of 1985 requirements when it "expressly referred" to the required findings in the *Federal Register* Notice of Implementation. *Id*. The USDA also argued that the participation of the Deputy Under Secretary for Farm and Foreign Agricultural Services in making the PIK program decision satisfied the FSA requirements. *Id.*

The court described the former argument as "absurd," stating that "[r]eferencing a requirement is not the same as complying with that requirement." *Id.* The court dismissed the latter argument because the Under Secretary was not the final decisionmaker, and because there was "no evidence on either the administrative or summary judgment record that the Secretary delegated decisionmaking authority to [the Under Secretary]." *Id.* The court concluded that "[t]he record is devoid of any evidence that the Secretary, or a Department employee with final decisionmaking authority, ever complied with section 1308a." *Id.*

In the end, the D.C. Circuit reversed the district court's decision and remanded the matter to the USDA for the agency to determine if there were a "good cause for omitting notice and comment." *Id.* The court recognized that under the circumstances of this case the remedy would normally be to vacate the agency's action and "simply remand for the agency to start again." *Id.* In this case, events had unfolded to such an extent (i.e., crops already plowed under) that it would be "an invitation to chaos" to vacate the agency's action. *Id.* Further, the court noted that "[t]he decision to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Id.* (citing *Allied Signal, Inc. v. United States Nuclear Regulatory Commission,* 988 F.2d 146, 150-51 (D.C. Cir. 1993))(quoting *International Union UMW v. FMSHA,* 920 F.2d 960, 966-67 (D.C. Cir. 1990)).

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[1] Although the 2000 sugar program was relevant to the plaintiffs' case, their action challenged the 2001 sugar crop program. The alleged economic effects of the 2000 program were relevant to the plaintiffs' arguments with respect to standing. The portions of the 2000 sugar program relevant to the plaintiffs' case are incorporated in the discussion above.

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commit fraud on the United States–in the form of approving operating loans to the Hart brothers' partnerships–in violation of [18 U.S.C.] § 201(b)(1)(B)." *Id.*

Rodalton argued that the district court abused its discretion when it permitted a government witness to testify as a summary witness, and when it allowed the witness to present several FHPs that the witness personally prepared. *Id.* at *3. The Federal Rule of Evidence governing the use of in court summaries states in relevant part, "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." *Id.* (quoting Fed. R. Evid. 1006). A witness providing this type of information is referred to as a "summary witness."

Because charts and similar materials can have a significant influence on a jury, the Fifth Circuit has repeatedly cautioned that trial judges "'must carefully handle their preparation and use.'" *Id.* (quoting *United States v. Jennings,* 724 F.2d 436, 441 (5th Cir. 1984). The Fifth Circuit also stated that use of such evidence must be "'support[ed by] evidence [that] has been presented previously to the jury' to establish any assumptions reflected in the summary. *Id.* (quoting *Jennings,* 724 F.2d at 442).

The government witness introduced "*revised* FHPs that she had [personally] prepared, and testimony about the revised Plans." *Id.* The government contended that this testimony was proper because it merely illustrated what the result would have been if all the debts included by the government witness had been included on the FHPs submitted by Rodalton and his brothers. *Id.*

Rodalton argued that the government did not present any evidence prior to the witness's testimony that demonstrated or established that the debts the govern-

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Appellate court upholds EPA authority to set limits on water pollution from agricultural sources

By Anne Hazlett

On May 31, 2002, the Ninth Circuit Court of Appeals issued a long-awaited decision in *Pronsolino v. Nastri.* 2002 U.S. App. Lexis 10308 (9th Cir. May 31, 2002). Addressing the extent to which the federal government can regulate particular types of water pollution, the appellate court affirmed a lower court ruling that non-point sources of pollution, such as runoff from agricultural and timber management practices, are subject to regulation under § 303(d) of the Clean Water Act.[1] Interestingly, the decision has been described as "landmark" by regulators and "pivotal" by municipal interests, but as "mixed" by agricultural groups. *See* Press Release, "Federal Appeals Court Upholds Landmark Clean Water Decision," Environmental Protection Agency Region 9, June 3, 2002, http://yosemite.epa.gov/r9/r9press.nsf; Press Release, "AMSA Wins Pivotal Clean Water Act Case," Association of Metropolitan Sewerage Agencies, June 3, 2002, http://www.amsa-cleanwater.org/advocacy/releases; Press Release, "Judge Renders Mixed Ruling on Non-Point Source Pollution," California Farm Bureau Federation, June 5, 2002, http://www.cfbf.com/agalert/2002.

Known as the "total maximum daily load program," § 303(d) requires states to identify and compile a list of waters for which effluent limitations, regulatory limits imposed on point sources of pollution, are not stringent enough to implement water quality standards prescribed for such waters. 33 U.S.C. § 1313(d)(1)(A). Once the list is prepared, states are then required to develop a total maximum daily load ("TMDL") for each water on the list. 33 U.S.C. § 1313(d)(1)(C). A TMDL is a measure that defines the greatest amount of a particular pollutant that can be introduced into a waterway without exceeding an applicable water quality standard. *See Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). Section 303(d) requires the TMDL to be established at "a level necessary to implement the applicable water quality standard." 33 U.S.C. § 1313(d)(1)(C).

While originally enacted as part of the 1972 Clean Water Act, § 303(d) was rarely implemented by the Environmental Protection Agency ("EPA") until the early 1990s. Jim Vergura and Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317, 320 (2001). In the late 1980s and early 1990s, environmental interests began suing the agency to force development of TMDLs for impaired waterways.[2] *Id.* This litigation activity reached California in 1995 when a group of fishermen and environmental advocates sued EPA, contending that the agency had failed to prepare TMDLs for seventeen impaired rivers. *Pronsolino v. Marcus*, 91 F.Supp. 2d 1337, 1339 (N.D. Cal. 2000). When EPA drafted a TMDL for the Garcia River in response to the litigation, Guido and Betty Pronsolino, timber landowners in the watershed, brought suit challenging the agency's authority to regulate their land management activities under § 303(d).

The purpose of this article is to provide an overview of the *Pronsolino* decision and its potential implications for production agriculture.

Background

The function of the TMDL developed for the Garcia River is to reduce sediment loading to the waterway. To accomplish this goal, the Garcia River TMDL allows for 552 tons of sediment loading per square mile per year. *Pronsolino*, 2002 U.S. App. Lexis 10308, at 14. That loading is a 60 percent reduction from historical contributions. *Id.* The TMDL allocates portions of this load among the following categories of non-point source pollution: (a) "mass wasting" associated with roads, (b) "mass wasting" associated with timber harvesting, (c) erosion related to road surfaces, and (d) erosion related to road and skid trail crossings. *Id.*

In 1998, the Pronsolinos applied for a timber harvest permit from the California Department of Forestry ("Department") to remove timber from their 800-acre property in the Garcia River watershed. *Id.* at 15. To comply with the Garcia River TMDL, the Department required, among other things, that the Pronsolinos mitigate 90 percent of the controllable sediment run-off related to roads. *Id.* As a condition of the permit, the Department also prohibited harvesting from mid-October until May 1 and banned the removal of certain trees.[3] *Id.* The Pronsolinos' forester estimated that the tree removal restriction alone would cost the operation $750,000. *Id.*

In the same year, Larry Mailliard, a member of the Mendocino County Farm Bureau, submitted a draft harvesting permit to the Department for a portion of his property also located in the Garcia River watershed. *Id.* at 16. As a condition of the final permit, the Department required over a 60 percent reduction in sediment loading in order to comply with the Garcia River TMDL. *Id.* Mailliard estimated that this restriction would cost him $10,602,000. *Id.*

Finally, Bill Barr, another member of the Mendocino County Farm Bureau, also applied for a harvesting permit in 1998 for land in the Garcia River watershed. *Id.* After incorporating restrictions similar to those included in the Pronsolino permit, the Department granted Barr's permit. *Id.* Those additional limitations would cost Barr at least $962,000. *Id.*

In August of 1999, the Pronsolinos, along with the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation, brought an action against EPA in a Northern California district court. *Id.* at 16-17; *See Pronsolino v. Marcus*, 91 F.Supp. 2d 1337. Grounding their claims in the federal Administrative Procedure Act, the Pronsolinos challenged EPA's authority to impose TMDLs on waterways polluted solely by non-point sources of pollution. *Pronsolino*, 91 F.Supp. 2d at 1338, 1346. Specifically, they contended that Congress gave EPA direct regulatory authority in § 303(d) only over point sources and that control of non-point sources was specifically reserved to the states. *Id.* at 1342, 1346. Further, the Pronsolinos sought a determination of whether the clean water statute authorized the Garcia River TMDL. *Id.* at 1346.

The parties filed cross-motions for summary judgment. On August 6, 2000, the district court entered judgment in favor of the government. There, the court held that the TMDL program was designed to apply to every navigable water in the country, regardless of its source of impairment. *Id.* at 1356. In so doing, the court acknowledged that the statute applies TMDLs to point and non-point sources differently. *Id.* As to point sources, the court held that TMDLs are to be taken into account in further restricting effluent limitations. *Id.* By contrast, TMDLs incorporating non-point sources are to be included in the states' continuing planning processes for improving water quality. *Id.*

To resolve the question of whether the TMDL program applies to waters impaired by non-point sources, the Pronsolinos filed an appeal.

Analysis

In reviewing the district court's deci-

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sion in favor of EPA, the Ninth Circuit was faced with an initial question of the degree of deference owed to EPA's regulations and decisions interpreting and applying § 303(d). *Pronsolino*, 2002 U.S. App. Lexis 10308, at 18. On this issue, EPA argued that the government was entitled to deference to its interpretation of § 303(d) as embodied in the agency regulations, pursuant to *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Id.* At the opposite end of the deference spectrum, the Pronsolinos asserted that EPA's interpretation was not owed any deference because EPA has not included its current interpretation, that § 303(d) is applicable to waters impaired only by non-point sources, in a regulation that has the force of law. *Id.* at 19. Moreover, the agency has inconsistently interpreted § 303(d). *Id.*

An agency's statutory interpretation is entitled to *Chevron* deference if "Congress 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." *Id.* (quoting *United States v. Mead*, 533 U.S. 218, 226-27 (2001)). If *Chevron* deference applies, the court must defer to the agency's interpretation as long as it is reasonably consistent with the statute. *Id.*

In applying that standard here, the Court first noted that EPA has the statutory authority to enact a rule regarding the identification of impaired waters and corresponding TMDLs. *Pronsolino*, 2002 U.S. App. Lexis 10308, at 20. The Clean Water Act delegates to EPA the general rulemaking authority necessary for the agency to carry out its functions under the Act. *Id.* One of those functions is to approve or disapprove a state's § 303(d) list and any required TMDLs. *Id.*

The Court then turned to the Pronsolinos' allegation that EPA has not exercised its rulemaking authority on the issue at hand. There, the Pronsolinos asserted that none of the agency's current regulations expressly preclude their position that § 303(d) does not apply to waters impaired only by non-point source pollution. *Id.* Focusing on EPA's regulations relating to the definition of a TMDL, requirements for waters placed on a § 303(d) list, water quality standards, and water quality management plans, the Court concluded that the agency rules concerning § 303(d) lists and TMDLs apply whether a water body receives pollution from point sources only, non-point sources only, or a combination of the two. *Id.* at 21-24. The Court also determined that EPA has issued several directives concerning the states' requirements under § 303(d) that conform to this understanding of its regulations. *Id.* at 24.

Similarly, the Court rejected the Pronsolinos' position that EPA has been inconsistent in its interpretation of the statute. *Id.* at 26. EPA's initial regulations promulgated after the enactment of the clean water statute in 1972 clearly required the identification of waters polluted only by non-point sources for purposes of § 303(d). *Id.* In addition, the fact that EPA did not actively enforce § 303(d) until 1990 was inconclusive on the question in this case as that agency stance reflected a general regulatory failure to enforce the law, not a failure with regard only to waters impaired by non-point sources. *Id.* at 29.

With these two points, the Court held that EPA's interpretation of its authority under § 303(d) was entitled to *Chevron* deference. *Id.* at 25. At the very least, the Court stated, the government was owed substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id.* at 30. Under *Skidmore*, the court defers to an agency's position according to its persuasiveness based on the agency's expertise, care, consistency, and formality, as well as the logic of the agency interpretation. *Id.* at 19. In this case, the Court determined that *Skidmore* deference was warranted in the alternative because Congress entrusted EPA with the responsibility of approving or disapproving § 303(d) lists, EPA had specialized knowledge regarding the Clean Water Act, and EPA had consistently interpreted the provisions at issue. *Id.* at 30.

Applying *Chevron* deference, the Court moved to the substantive question at the heart of the Pronsolinos' appeal—whether EPA's position that non-point sources of pollution are subject to the TMDL program is consistent with the statute. Section 303(d)(1)(A) requires listing and calculation of TMDLs for "those waters within [the states] boundaries for which the effluent limitations required by section [301(b)(1)(A)] and section [301(b)(1)(B)] of this title are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Dissecting this language, the Pronsolinos maintained that the phrase "not stringent enough to implement … water quality standard[s]" must be interpreted to mean both that application of effluent limitations will not achieve water quality standards and that the waters at issue are subject to effluent limitations. *Pronsolino*, 2002 U.S. App. Lexis 10308, at 31-32. Since only waters with point source pollution are subject to effluent limitations, the Pronsolinos' interpretation would have excluded waters impaired only by non-point sources of pollution from the § 303(d) listing and TMDL requirements. *Id.* at 32.

By contrast, EPA interpreted "not stringent enough to implement ... water quality standard[s]" to mean "not adequate" or "not sufficient" to implement a water quality standard. *Id.* Under this reading of the statute, there is no implied limitation that § 303(d) is applicable only to waters initially covered by effluent limitations. *Id.* EPA asserted that if the use of effluent limitations would not implement an applicable water quality standard, the water would fall within § 303(d), regardless of whether point or non-point sources were the cause of its impairment. *Id.*

Looking at the contested phrase as well as the clean water statute's broad goal of improving water quality by attaining certain water quality standards, the Court concluded that the more sensible reading of this language is that the § 303(d) list must contain any waters for which applicable effluent limitations will not be adequate to achieve the statute's water quality goals. *Id.* at 33-34. The Court wrote: "Nothing in § 303(d)(1)(A) distinguishes the treatment of point sources and non-point 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 non-point sources." *Id.* at 38.

Beyond the reading of this select language, the Court also rejected the notion that there is a general division between point and non-point sources throughout the Clean Water Act. *Id.* at 39. While it acknowledged that point sources are treated differently from non-point sources for many purposes under the statute, the Court asserted that there is no such distinction with regard to the basic purpose for which the § 303(d) list and TMDLs are compiled. *Id.* The purpose of the TMDL program is the eventual attainment of state-defined water quality stan-

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dards. *Id.* These standards do not depend in any way on the source of pollution. *Id.* at 40.

Further, the Court conceded that there are two sections of the clean water statute, § 208 and § 319, which set requirements exclusively for non-point sources of pollution. *Id.* at 41. But, it held that there is no irreconcilable contradiction between the requirements contained in these sections and § 303(d). *Id.* Section 208 provides for federal grants to encourage the development of state areawide waste treatment management plans for areas with substantial water quality problems. *Id.* Further, § 319 directs states to adopt non-point source management programs, provides grants for non-point source pollution reduction, and requires states to submit a report to EPA describing waters in need of additional action to control non-point sources of pollution. *Id.* at 42. These sections merely encourage state programs to mitigate non-point sources of pollution in a manner that complements the federal pollution control scheme. *Id.* at 44. They provide no basis for reading any other sections out of the statute. *Id.*

Moreover, the Court noted that § 303(d)(1)(C) requires states to establish TMDLs at a level that is necessary to implement the applicable water quality standards. *Id.* at 45. Water quality standards do not differentiate between point and non-point sources. *Id.* Therefore, in the case of blended waters, this language requires that TMDLs be calculated with regard to non-point sources of pollution, as otherwise it would be impossible to implement the applicable standards. *Id.*

Lastly, the Court addressed the Pronsolinos' contention that, by establishing TMDLs for waters impaired only by non-point source pollution, EPA has upset the balance of federal-state control in the Clean Water Act by intruding into the state's traditional control over land use. *Id.* at 47. Describing the Garcia River TMDL as an "informational tool," the Court quickly dismissed this concern. *Id.* at 48. Specifically, the Court explained that the TMDL merely identifies the maximum load of pollutants that can enter the Garcia River from certain categories of non-point sources if the river is to attain water quality standards. *Id.* at 47. It does not specify the load of pollutants that can be received from individual parcels of land or describe what measures California must take to implement the TMDL. *Id.* Rather, the TMDL expressly states that implementation and monitoring are responsibilities left to the state and, consequently, does not contain an implementation or monitoring plan. *Id.*

Importantly, the Court went on to say: "California chose both if and how it would implement the Garcia River TMDL. States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement." *Id.* at 48. Accordingly, the Pronsolinos' federalism argument for reading § 303(d) to exclude non-point sources was unfounded. *Id.* at 49.

In conclusion, the Court held that EPA did not exceed its statutory authority in identifying the Garcia River pursuant to § 303(d)(1)(A) and establishing the Garcia River TMDL, despite the fact that the river is polluted only by non-point sources of pollution. *Id.* at 50. With this conclusion, the Court expressly left open the question of whether EPA is authorized to expand the concept of a TMDL to include an implementation plan such as that required by the current draft of the TMDL regulatory amendments scheduled to go into effect on April 30, 2003. *Id.* at 47 n. 18.

Implications

The *Pronsolino* decision has two primary, and somewhat conflicting, implications for agricultural producers. On one hand, the Court's determination that the TMDL program is applicable to waters impaired by non-point sources presents a likely potential for burdensome, and possibly unrealistic, regulation for production agriculture. At present, EPA is under court order to develop TMDLs in over twenty states. Claudia Copeland, Congressional Research Service, 97-831: Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants (updated June 7, 2002). With hundreds or even thousands of TMDLs to be developed over the next several years, agriculture will undoubtedly become a central part of the TMDL program. Many advocates of clean water in the environmental, municipal, and point source communities believe that controlling non-point source pollution, such as agricultural runoff, is a key component to achieving the goals and objectives of the Clean Water Act. *Id.*; *See also* AMSA Press Release ("[T]he appeals court decision endorses the point source position that non-point sources must be part of the solution to achieve water quality in America.") The Ninth Circuit's decision in this case moves those interests significantly closer towards the restoration of water quality through limitations on non-point source degradation.

On the other hand, however, the *Pronsolino* decision raises substantial questions as to the ability of EPA to enforce specific requirements within a TMDL once one is developed. In its opinion, as previously noted, the Ninth Circuit stated with no ambiguity that § 303(d) provides the agency with no enforcement authority: "States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement." *Pronsolino*, 2002 U.S. App. Lexis 10308, at 48. This piece of the Court's holding is perhaps an even more forceful statement than that made by the district court where Judge Alsup wrote: "Unlike EPA's authority to revise individual NPDES permits issued by states for individual point sources, EPA received no authority to review land-use restrictions placed (or not placed) on timber-harvesting permits by CDF or any other practice permitted for agriculture or silviculture. The 1972 Act was clear that states should finally decide whether, and to what extent, land-management practices should be adopted to mitigate runoff." *Pronsolino*, 91 F.Supp. 2d at 1355.

Resolution of the question of what EPA can do with a TMDL once a state fulfills its duties under § 303(d) is particularly significant today where the fate of revisions to the TMDL rule is unclear. On July 13, 2000, EPA proposed revisions to the TMDL regulations that would require states to prepare an implementation plan that describes the actions necessary to implement the TMDL. *See* Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Programs in Support of Revisions to the Water Quality and Planning Management Regulation, 65 Fed. Reg. 43585, 43668 (2000). Such a plan would have to include "a description of specific regulatory or voluntary actions, including management measures or other controls, by federal, state or local governments, authorized tribes or other individuals that provide reasonable assurance [that load implications will be implemented]." *Id.* To show "reasonable assurance" in the case of waterways impaired only by non-point sources, states would have to show that management measures or other control actions to implement the allocations contained in the TMDL meet the following four-part test: (1) "they specifically apply to the pollutant(s) and the waterbody for which the TMDL is established," (2) "they will be implemented as expeditiously as possible," (3) "they will be accomplished through reliable and effective delivery mechanisms," and (4) "they will be supported by adequate funding." *Id.* at 43663.

While the revised TMDL rule was final on October 18, 2001, the regulation is not currently in effect. On August 9, 2001, EPA proposed that the effective date for the rule be extended to April 2003 in order to allow the agency to reconsider

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some of the choices made in the July 2000 rule. To date, EPA has made no public declarations as to any changes it intends to make to the revised rule. Should the agency choose to retain the implementation plan component, however, litigation is certain to ensue.[4] In the alternative, Congress may limit implementation of the revised rule.[5]

Notwithstanding the final outcome of revisions to the TMDL regulations, there is an important question underlying any challenge to EPA's authority to implement a TMDL that may be overshadowed in the discussion. That is, what is the practical effect of tying TMDL implementation to federal grant money under §319, for example? In its opinion, the district court raised this point: "A practical reality, of course, is that once federal environmental grant money begins to flow, state regulatory agencies become dependent on it. They become sensitive to threats to terminate it—terminations that would entail job and programmatic cuts. This influences behavior. A state may uncritically apply TMDL-loading reductions, like the ones at issue, without regard to other legitimate state interests or to the unique circumstances of an applicant." *Pronsolino*, 91 F.Supp. 2d at 1355. In theory, EPA may not have the authority to require implementation of a TMDL. However, particularly in times of state budgetary shortfalls, the agency may in fact be well-positioned to strong arm compliance with a TMDL's individual provisions.

Conclusion

The Ninth Circuit's decision in *Pronsolino* clearly represents a considerable victory for regulators in bringing much of production agriculture into the hook of § 303(d). At the same time, however, it confirms that the authority to directly control non-point source pollution rests with the states, not the federal government. With that dichotomy in play, the effect of the TMDL program on farmers and ranchers continues to be defined.

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[1] The Clean Water Act does not define "non-point source." But, § 502 defines the term "point source" as any "discernible, 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." 33 U.S.C. § 1362(14).

[2] To date, EPA is under court order to establish TMDLs in twenty-two states. "TMDL Litigation by State," Environmental Protection Agency, http://www.epa.gov/owow/tmdl/lawsuit1.html. Further, suits have been filed in five additional states seeking to compel EPA to establish TMDLs. *Id.*

[3] In total, the harvesting permit specified that the Pronsolinos must: (a) inventory controllable sediment sources from all roads, landings, skid trails and agricultural facilities by June 1, 2002, (b) mitigate 90 percent of controllable sediment volume at road-related inventoried sites by June 1, 2012, (c) prevent sediment loadings caused by road construction, (d) retain five conifer trees greater than 32 inches in diameter at breast height... per 100 feet of all Class I and Class II watercourses, (e) harvest only during dry, rainless periods between May 1 and October 15, (f) refrain from constructing or using skid trails on slopes greater than 40 degrees within 200 feet of a watercourse, and (g) forbear from removing trees from certain unstable areas which have a potential to deliver sediment to a watercourse. *Pronsolino*, 2002 U.S. App. Lexis 10308, at 15 n. 6.

[4] In fact, there is currently a pending challenge to the rule brought by the American Farm Bureau Federation. Just five days after the final rule was published in the Federal Register, Farm Bureau filed a petition in the U.S. Court of Appeals for the District of Columbia to challenge the amended regulations. *Water Pollution: Farm Bureau Asks U.S. Appeals Court to Review Final Rule on Impaired Waters*, National Environmental Daily (BNA), July 21, 2000 (*American Farm Bureau Federation v. Browner*, D.C. Cir., No. 00-1320). Among other things, Farm Bureau is challenging EPA's authority to expand the concept of a TMDL to include an implementation plan and to require reasonable assurance that the TMDL will be carried out. *Id.* That action is presently stayed pending EPA's review of the revised rule.

[5] The revised rules have already generated a substantial amount of controversy in Congress largely in part due to their treatment of non-point sources. Through an appropriations rider, Congress ultimately prohibited EPA from using any money in fiscal years 2000 and 2001 to implement the new rule. Moreover, during the 106th Congress, resolutions were introduced in the House and Senate to disapprove the rule under the Congressional Review Act. H.J. Res. 105, 106th Cong. (2000); S.J. Res. 50, 106th Cong. (2000).

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ment witness included in her FHP summaries "*should actually have been reported in the categories she selected, should even have been reported in the five Farm and Home Plans at all, or even the proper amounts of such debts that should or should not have been reported on the Farm and Home Plans.*" *Id.* at *3-4. In other words, Rodalton contended that the testimony exceeded the proper scope of Fed. R. Evid. 1006 because the testimony was not supported by evidence that had been previously presented to the jury. *Id.* (see *Jennings,* 724 F.2d at 442). In an *in camera* conference with the trial judge, Rodalton reasoned, "By not requiring them to prove that the debts themselves are debts that should be reported, allowing them to simply call a witness to put them into a category without knowledge, without—and not an expert prejudices us, and *it goes beyond a summary witness,* your Honor." *Id.* at *4.

After reviewing the entire record the Fifth Circuit concluded that it was "apparent to us that [the government witness] functioned as the government's sole expert regarding the proper preparation of (1) FHPs generally, and (2) the Hart brothers' FHPs in particular, thereby unquestionably exceeding the scope of FRE 1006." *Id.* The court noted that the government could have simply had an expert witness testify for this purpose, but chose not to do so at its own peril. *Id.* at *6.

Finally, the court ruled that without the testimony of the government witness, there was not sufficient evidence to support Rodalton's conviction. *Id.* at *7. The Fifth Circuit stated, "We are convinced, in fact, that absent [the government witness's] testimony and accompanying documents, the government failed to prove a critical element of its case against Rodalton beyond a reasonable doubt, and that Rodalton's substantial rights were affected by the admission of [the witness's] revised FHPs and her explanatory testimony." *Id.* The court held that this constituted reversible trial error, in which the proper remedy was to vacate the judgment, and remand the case for a new trial. *Id.*

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