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The Proof Is in the Policy: The Bush Administration, Nonpoint Source Pollution, and EPA's Final TMDL Rule

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The Proof Is in the Policy: The Bush Administration, Nonpoint Source Pollution, and EPA's Final TMDL Rule*

R. Bryant McCulley**

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* Author's Note: During the publication process of this Note, the Bush administration took two important steps with regard to the Final TMDL Rule. First, on October 12, 2001, the U.S. Court of Appeals for the District of Columbia granted the EPA's motion to hold *American Farm Bureau Federation v. Whitman* in abeyance for eighteen months. Second, the EPA issued a rulemaking on October 12, 2001, that suspends the Final TMDL Rule's effective date by eighteen months, until April 30, 2003. See 66 Fed. Reg. 53,044 (Oct. 18, 2001) (to be codified at 40 C.F.R. pts. 9, 122-24, 130).

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As an avid outdoorsman, I know all our prosperity as a nation will mean little if we leave future generations a world of polluted air, toxic waste, and vanished wilderness and forests.

— President George W. Bush¹

Only by measuring the quality of the environment – the purity of the water, the cleanliness of the air, the protection afforded the land – can we measure the success of our efforts.

— Christine Todd Whitman, Administrator, EPA²

1. Republican National Committee, *American Partners in Conservation and Preservation: Stewardship of Our Natural Resources*, available at <http://www.rnc.org/GOPinfo/platform/2000platform6> (last visited Feb. 4, 2002) [hereinafter RNC Platform].

2. U.S. EPA, *Statement of Governor Christine Todd Whitman, Nominee to be Administrator of the Environmental Protection Agency, before the United States Senate Committee on Environment and Public Works, Washington, D.C., January 17, 2001*, available at http://www.epa.gov/epahome/speeches_011801.htm (last visited Feb. 29, 2001) [hereinafter *Whitman Testimony*].

I. Introduction

The election of George W. Bush as our nation's forty-third President comes at a critical time in America's long fight to preserve and maintain its water resources. Since the passage of the Clean Water Act (CWA or the Act) in 1972,³ the Environmental Protection Agency (EPA) has focused on helping states regulate water pollution through the use of technology-based standards and permitting programs. Although this focus on technology-based regulation has been effective in addressing point sources of water pollution, nonpoint source (NPS) pollution has continued to increase.⁴ NPS pollution occurs when water runs over land or through the ground, picks up pollutants, and deposits them in surface waters or introduces them into groundwater.⁵ Today, NPS pollution is the greatest threat to America's waters and is the main reason why over 40% of assessed waters still do not meet the water quality standards (WQS) that states, territories, and authorized tribes have set for them.⁶ In

3. The Clean Water Act originated as the Federal Water Pollution Control Act (FWPCA). FWPCA, ch. 758, 62 Stat. 1155 (1948). Congress renamed the FWPCA the "Clean Water Act" in the 1977 Amendments. Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)). For purposes of clarity, the acronym CWA will be used throughout this Note as a naming convention for both the original and amended statutes. *See id.* § 2 ("This Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act).").

4. David Zaring, *Federal Legislative Solutions to Agricultural Nonpoint Source Pollution*, 26 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,128, 10,128 (Mar. 1996).

5. U.S. EPA, *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, available at <http://www.epa.gov/OWOW/NPS/facts/point1.html> (last visited Feb. 4, 2002) [hereinafter *NPS Facts*]; Dianne K. Conway, Note, *TMDL Litigation: So Now What?*, 17 *VA. ENVTL. L.J.* 83, 87 (1997). Although the CWA does not provide a definition of "nonpoint source pollution," EPA has defined it as follows:

Nonpoint source pollution is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of the water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

EPA, *NONPOINT SOURCE GUIDANCE* 3 (1987).

6. *See NPS Facts*, *supra* note 5 (discussing NPS pollution as nation's largest water quality problem); U.S. EPA, *Overview of Current Total Maximum Daily Load-TMDL-Program and Regulations*, available at <http://www.epa.gov/OWOW/NPS/facts/point1.html> (last visited Feb. 4, 2002) [hereinafter *Overview of TMDL Program*] (stating that over 40% of assessed waters do not meet water quality standards); Oliver A. Houck, *TMDL IV: The Final Frontier*, 29 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,469, 10,469-70 (Aug. 1999) (stating that even though CWA is probably most successful environmental program in America, unregulated sources of pollution have "blossomed like algae to consume the gains" made through technological stand-

forty-two states, nonpoint sources are the predominant source of pollution in lakes, and in thirty-three states, NPS pollution is the most significant impairment of streams and rivers.⁷ Additionally, nonpoint sources account for 43% of the pollution in the nation's estuaries.⁸

These overwhelming effects on America's water resources have thrust NPS pollution into the environmental policy spotlight. The focus of the NPS pollution debate is the Total Maximum Daily Load (TMDL) program found in § 303(d) of the CWA.⁹ While the term "total maximum daily load" is not expressly defined in the CWA, the EPA's current regulations define a TMDL as the sum of the "wasteload allocations" for point sources (PS), the "load allocations" for NPS, and a margin of safety.¹⁰ Thus, a TMDL is an estimate of the maximum amount of a pollutant that a waterbody can assimilate and still meet an applicable WQS.¹¹ It is helpful to think of TMDLs as a recipe for a water segment in which each ingredient represents the maximum amount of a certain pollutant that can be present while allowing the segment to remain healthy. Therefore, for each impaired water segment, states must ascertain exactly which pollutants are present in the water and then work backward to determine the amount of pollutants each source can add to the mix.

Although Congress established the TMDL program in 1972, § 303(d) has lain dormant as the EPA has concentrated on fulfilling its obligations to create technology limits via discharge permits under § 402 of the Act.¹² In the past decade, citizen groups have filed numerous lawsuits against the EPA demanding the listing of rivers and the development of TMDLs under § 303(d).¹³ After more than twenty years of hibernation, these lawsuits have awakened the sleeping giant of TMDLs and have changed the focus of federal water pollution regulation from technology-based standards to water quality-based

ards); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY* L.Q. 263, 287-91 (stating that NPS pollution accounts for 65-75% of pollution in nation's most polluted waters and that farms are major source of NPS pollution nationally).

7. Zaring, *supra* note 4, at 10,128-29 (quoting EPA, NATIONAL WATER QUALITY INVENTORY: 1986 REPORT TO CONGRESS 24, 31, 43 (1986)). Zaring also noted that in five states, NPS pollution accounts for over 90% of stream and river pollution, and that in six states, NPS pollution accounts for 100% of lake pollution. *Id.*

8. *Id.* at 10129.

9. 33 U.S.C. § 1313(d) (1994).

10. 40 C.F.R. § 130.2(g)-(i) (2001).

11. See 40 C.F.R. § 130.7(c)(1) (2001) (providing that states must set TMDLs so that applicable WQS are attained and maintained); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (discussing components of TMDLs).

12. 33 U.S.C. §§ 1342 (a)-(b) (1994).

13. There have been over forty suits filed in thirty-seven states. See *TMDL Litigation by State*, available at <http://www.epa.gov/owow/tmdl/lawsuit1.html> (last visited Feb. 4, 2002) [hereinafter *Summary of Litigation*] (giving status of lawsuits involving TMDLs).

standards.¹⁴ Through consent decrees and judgments, the majority of these lawsuits have forced the EPA to assume its statutory obligation under § 303(d) to list impaired waters and to create TMDLs for these waters when states fail to undertake this responsibility.¹⁵

Realizing the magnitude of, and the need for direction in, the TMDL process, the EPA began a comprehensive evaluation of the EPA's and the states' implementation of their § 303(d) responsibilities in 1996.¹⁶ This four-year evaluation process culminated in the issuance of the EPA's Final TMDL Rule¹⁷ (Final Rule or the Rule), which EPA Administrator Carol Browner signed on July 11, 2000.¹⁸ Administrator Browner signed the Final Rule amidst a firestorm of controversy stirred by industry groups and politicians angered at the prospect of TMDLs including rivers affected solely by NPS pollution.¹⁹ Only weeks after the EPA published the Rule, opponents in Congress added a rider to an appropriations bill to prohibit the EPA from spending fiscal year 2001 money to implement the Rule.²⁰ This rider mandates that the current

14. See OLIVERA, HOUCK, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION* 75 (1999) ("Against a background of federal environmental programs in which litigation has played a central role, it is hard to think of any program more precipitously driven by citizen suits from absolute zero toward its statutory destiny than TMDLs.").

15. See *Summary of Litigation*, *supra* note 13 (giving status of lawsuits involving TMDLs).

16. The EPA convened a committee under the Federal Advisory Committee Act, composed of twenty individuals with diverse backgrounds, to undertake this analysis. The FACA Committee published its report in 1996, and the EPA used the report in the rulemaking process. See U.S. EPA, *TMDL Federal Advisory Committee*, available at <http://www.epa.gov/owow/tmdl/advisory.htm> (last visited Feb. 4, 2002) (discussing FACA committee and report).

17. Final TMDL Rule, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122-24, 130).

18. *Id.* The Final Rule was published on July 13, 2000. *Id.* For purposes of judicial review, the EPA provided that the rule was final on July 27, 2000. *Id.*

19. See Daniel V. Hyde, *Are TMDLs the Answer for Cleaning the Nation's Waters?*, 23 L.A. LAW. 15, 15 (2000) (stating that proposed EPA TMDL regulations are "highly controversial"); John Stantan & Mark Shipman, *Special Report: Despite Lack of Support EPA Sends Embattled Water Act Rule to White House for Review*, INSIDE EPA, June 21, 2000, at 1-2 (discussing political climate surrounding Final Rule). Hyde believes the following:

The potential repercussions of the TMDL program include vastly increased costs for municipal wastewater treatment, restrictions on new residential and industrial development, and new regulatory mandates for agriculture, municipal storm water dischargers, the timber and mining industries, and other industries that were not previously subject to regulation under the Clean Water Act.

Hyde, *supra*, at 15.

20. Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, Title II, chap. 8, 114 Stat. 511, 567 (2000). Interestingly, Congress attached this rider to a virtually "veto-proof" conference report that included supplemental funding for military activities in Kosovo, aid to Colombia, and domestic disaster relief. See *Water Pollution: Supplemental Spending Bill Approved by Congress Stops TMDL Rulemaking Effort*, Chem. Reg. Daily (BNA) (July 3, 2000), available at WL 7/3/2000 CHR D2 (discussing rider).

rule remain in effect until thirty days after Congress permits the EPA to implement the Final TMDL Rule.²¹ The result is that after more than four years, hundreds of meetings, much debate, and the EPA's review of over 34,000 comments, the Rule must gain Congressional approval prior to implementation.²²

While the Final TMDL Rule awaits legislative action, the legal battle over TMDLs, and possibly the future of the Clean Water Act itself, is presently ongoing in the U.S. Court of Appeals for the District of Columbia. In *American Farm Bureau Federation v. EPA*,²³ the D.C. Circuit has consolidated numerous suits by industry groups that attack the Final Rule. The complex assembly of parties involved in the litigation illustrates the importance of this legal battle.²⁴ This case is unique in environmental jurisprudence because it does not simply involve industry organizations arguing against environmental groups. The NPS pollution controversy finally has broken the ranks of the point source industries, and for the first time, the Association of Metropolitan Sewerage Agencies (AMSA) has joined environmental groups and the EPA to argue that the NPS industries should be accountable for their role in degrading America's waters.²⁵

21. The states and the EPA continue to develop and complete TMDLs under the current rule, as required by the CWA and many court orders. See *Summary of Litigation, supra* note 13 (giving status of lawsuits involving TMDLs). The regulations that currently apply were issued in 1985 and amended in 1992. See 40 C.F.R. § 130.7 (2001) (mandating that states list impaired and threatened waters and develop TMDLs).

22. See *Overview of TMDL Program, supra* note 6 (discussing status of Final Rule).

23. No. 00-1320 (D.C. Cir. filed July 18, 2000) (on file with author). For purposes of clarity, this case generally will be referred to as the "*American Farm Bureau litigation*" in this Note.

24. *Id.* The Petitioners include the American Farm Bureau Federation, the National Corn Growers Association, the American Forest and Paper Association, the American Crop Protection Association, the National Pork Producers Council, the National Cattlemen's Beef Association, the Fertilizer Institute, the TMDL Coalition, the National Chicken Council, Friends of the Earth, and the Water Keeper Alliance. *Id.* The Respondents include the Environmental Protection Agency, the Sierra Club, Friends of the Earth, the Water Keeper Alliance, Northwest Environmental Advocates, Center for Marine Conservation, the National Wildlife Federation, the Southern Environmental Law Center, Trout Unlimited, and the Association of Metropolitan Sewerage Agencies (AMSA). Amicus curiae include Coast Action Group, Lake Michigan Federation, and the Texas Natural Resource Conservation Commission. *Id.*

25. Technically, this is not the very first time AMSA has supported the EPA's position that TMDLs should include rivers affected solely by NPS pollution. AMSA intervened in *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) and supported the EPA's argument that NPS pollution must be included in the TMDL process. Thus, the overall TMDL debate over whether to include rivers affected by NPS pollution, and not merely the *American Farm Bureau litigation*, marks the first time that AMSA has joined hands with the EPA to argue for increased regulation of NPS industries. See *Water Pollution: Nonpoint Sources Should Not Be Excluded From TMDL Program, Government to Argue*, Daily Env't Rep. (BNA) (Mar.

The AMSA's decision to support the Final TMDL Rule makes economic sense. Municipal sewerage agencies are one of the most regulated point source industries in the nation, and the inclusion of the NPS industries in the TMDL process will lessen the regulatory load that the EPA has placed on point sources for the past thirty years.²⁶ Point source regulation via effluent limitations has reached a point of diminishing returns as incremental reductions in pollution have become prohibitively expensive.²⁷ The NPS industries, however, have remained entirely unregulated, so the cost of initial pollution control for these industries would be far less expensive than additional controls for point sources.²⁸ Thus, a central argument for the inclusion of NPS

20, 2000), available at WL, 54 DEN A-10, 2000 (stating that AMSA attorneys in *Pronsolino* argued that "removing nonpoint sources from the scope of TMDL regulations 'would foist the entire burden for improving the quality of impaired waters on point source dischargers, particularly publicly owned treatment works'").

26. See *Water Pollution: Nine Petitions for Review Filed Challenging EPA Final Rule Revising TMDL Program*, Chem. Reg. Daily (BNA) (Dec. 11, 2000), available at WL 12/11/2000 CHR D6 (discussing AMSA's role as intervenor in petitions for review of Final TMDL Rule). BNA reported the following:

Greg Schaner, who oversees legal affairs for AMSA . . . supports EPA's efforts to include nonpoint sources of pollution in the TMDL program. Failure to include the contribution of nonpoint sources to water quality impairment will put more of the burden for cleanup on point source dischargers, such as municipal waste water treatment facilities While the final TMDL revisions are not perfect, . . . [the revisions] take an important step toward addressing nonpoint sources of pollution.

Id.

27. See *AMSA, Nonpoint Pollution Control Crucial to Achievement of Clean Water Goals*, available at <http://www.amsa-cleanwater.org/about/position/nonpoint.htm> (last visited Feb. 4, 2002) (discussing unreasonable burden on point sources if NPS pollution is not addressed). "Control of nonpoint source pollution is critical to meeting the goals of the CWA. Without it, municipalities and industry will be required to invest in increasingly stern controls that have little environmental benefit." *Id.*

28. See *id.* (stating that control of NPS pollution "can be as simple as erecting fences to keep livestock out of streams"); U.S. EPA, *Managing Nonpoint Source Pollution from Agriculture*, available at <http://www.epa.gov/OWOW/NPS/facts/point6.htm> (last visited Feb. 4, 2002) [hereinafter *Managing NPS Pollution from Agriculture*] (stating that farmers and ranchers can reduce erosion and sedimentation by 20-90% by applying management measures to control volume and flow rate of runoff water, to keep soil in place, and to reduce soil transport). With regard to NPS pollution from livestock, farmers and ranchers can adjust grazing intensity, fence livestock out of sensitive areas, provide alternative sources of water and shade, and revegetate rangeland and pastureland. *Id.* These solutions, like planting hedgerows and fencing cattle out of rivers, are surprisingly simple. See also HOUCK, *supra* note 14, at 143 ("Compared to the technology and investments required of point source industries, [NPS solutions] are simple, practical, and at hand."). "The major expenses in nonpoint source pollution arise from compensating farmers and other nonpoint sources for land use practices that will reduce runoff and protect downstream uses. Although these costs can be considerable . . . they are far less expensive than additional technological controls on point sources." *Id.* at 159 n.123.

industries in the TMDL process is one of economic efficiency.²⁹ A related argument for the inclusion of NPS industries in the TMDL process is one of sheer logic: for waters polluted primarily or solely by NPS pollution, no amount of point source regulation will enable WQS to be met.³⁰

The American Farm Bureau Federation (AFBF) and other industry petitioners argue, however, that the EPA has exceeded its authority in promulgating the Final Rule. Specifically, AFBF and other industry groups believe that the EPA acted unlawfully in requiring that waters be listed as impaired and TMDLs developed if the sources of the impairment are NPS.³¹ These industry groups also believe that the EPA exceeded its statutory authority by requiring TMDLs to include implementation plans, attainment schedules, and "reasonable assurances" that the TMDLs will in fact achieve applicable WQS.³² Ironically, the future of the CWA may now hinge on the statutory interpretation of § 303(d) – a section that Congress originally included in the CWA as a mere afterthought at the behest of states eager to retain a water quality-based "safety net" should the technological standards of § 402 fail to secure the goals of the Act.³³

By its very nature, NPS pollution is diffuse and its regulation involves contentious issues regarding land use and environmental federalism that strike to the very core of modern American environmental policy. Adding to this

29. See U.S. EPA, Testimony of J. Charles Fox, Assistant Administrator for Water, U.S. EPA before the Subcommittee on Oversight, Investigations, and Emergency Management, Committee on Transportation and Infrastructure, U.S. House of Representatives, July 27, 2000 [hereinafter EPA House Testimony], available at <http://www.epa.gov/OWOW/tmdl/finalrule/testimony.html> (last visited Feb. 4, 2002) (stating that EPA expects that new TMDL rules will result in adoption of more cost effective pollution control strategies). "[T]he final TMDL rules enhance opportunities for States to allocate pollution control responsibility from costly point source controls to generally lower cost measures to reduce nonpoint source pollution." *Id.*

30. See HOUCK, *supra* note 14, at 167 (discussing "logic" of TMDLs); National Wildlife Federation, *Factsheet on TMDLs: Myth vs. Fact*, available at <http://www.nwf.org/watersheds/factfiction.html> (last visited Feb. 4, 2002) [hereinafter *NWF TMDL Factsheet*] ("A TMDL program that doesn't address non-point source pollution would be close to meaningless-EPA estimates that of the waters in need of TMDLs 47% are point source and non-point source combined problems, 43% are non-point only, and only 10% are point source only.").

31. See *Water Pollution: Battle Lines Drawn as Interest Groups File Motions to Support, Challenge TMDL Rule*, Daily Env't Rep. (BNA) (Sept. 1, 2000), available at 2000 WL 171 DEN A-10 (discussing litigation attacking Rule).

32. Petitioners' Statement of Issues to Be Raised, Nat'l Corn Growers Assoc. v. EPA (D.C. Cir. filed Sept. 28, 2000) (No. 00-1320 and consolidated cases) (on file with author).

33. See HOUCK, *supra* note 14, at 12-24 (analyzing evolution of § 303 of CWA and concluding that, ironically, this water quality-based section was added late in game at insistence of states and dischargers who were eager to retain this approach to pollution control); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 699, 729-33 (3d ed. 2000) (discussing TMDLs and referring to CWA's water-quality based standards as "regulatory safety net").

complexity, the regulation of NPS pollution also is intensely political. The major contributors to NPS pollution are no longer small family farms and ranches, but rather they are the politically powerful agriculture, silviculture, and mining industries.³⁴ For almost three decades, these industries have gone largely unregulated under the CWA and are committed to keeping their protected status.³⁵ Citizen groups and the EPA, however, have other plans for the NPS industries: the TMDL program.³⁶ These supporters of TMDLs argue that TMDLs are America's best hope for ensuring that NPS pollution does not erase the significant gains made by point source regulation under the CWA.³⁷

President George W. Bush is now in the unenviable position of inheriting the TMDL debate just as it is coming to its political and legal crisis, and he faces a situation that puts his political ideology in opposition to that of his political allies.³⁸ President Bush favors strict environmental federalism in which states and localities are given the power to solve environmental problems at the local level.³⁹ He also advocates cooperative partnerships between regulatory authorities and stakeholders to reduce litigation and to increase the effectiveness of environmental regulations.⁴⁰ The basic premise underlying these policies is the belief that environmental regulation should be economically efficient, so that "economic prosperity and environmental protection . . . advance together."⁴¹

34. See HOUCK, *supra* note 14, at 166 (stating that NPS industries are "led by multinational mining companies, timber corporations, agribusinesses the size of Archer Daniels Midland, and prominent members of the Fortune 500").

35. See *NWF TMDL Factsheet*, *supra* note 30 (discussing twenty-five year period of inaction in regulating NPS pollution).

36. See *id.* (advocating TMDLs).

37. See HOUCK, *supra* note 14, at 168 ("TMDLs hold the best prospect of those now available for coming to grips with the last major, unregulated sources of water pollution in this country.").

38. See The Center for Responsive Politics, *Agribusiness: Long Term Contribution Trends*, available at <http://www.opensecrets.org/industries/indus.asp?Ind=A> (last visited Feb. 4, 2002) [hereinafter *Agribusiness Political Contribution Data*] (providing data showing that agribusinesses contributed over \$2,500,000 to George W. Bush's campaign as compared with almost \$300,000 to Al Gore's campaign).

39. See RNC Platform, *supra* note 1 (discussing Bush's commitment to state and local regulation of environmental issues). The Republican National Committee believes the following:

While the very nature of environmental concerns at times requires federal intervention, the heartening progress made by many of the States and localities demonstrates their unique ability to solve problems at the local level. As the laboratories of innovation, they should be given flexibility, authority, and finality by the federal government.

Id.

40. *Id.*

41. *Id.*

The irony of TMDLs is that although the agricultural and silvicultural industries attack them as another example of the EPA seeking to usurp state regulatory authority, TMDLs are completely consistent with conservative environmental ideology.⁴² TMDLs are not part of a federal command and control regulatory regime. Instead, the TMDL program is a perfect example of environmental federalism. TMDLs are part of a water quality-based program that provides states with the complete authority to develop their own WQS, list their impaired waters, and regulate the point and nonpoint sources of pollution that impair water resources.⁴³ Also, and perhaps more importantly, the TMDL program is an economically efficient method of achieving water quality standards.⁴⁴ Thus, the TMDL issue presents a political litmus test of epic proportions to President Bush and his administration: whether to embrace a TMDL program based on environmental federalism and economic efficiency, or whether to protect the agriculture, silviculture, and mining industries from inclusion in the TMDL process.

This Note will examine the legality of the Final TMDL Rule with respect to its inclusion of waters affected solely by NPS pollution in the TMDL process. Part II analyzes § 303(d) and examines its role within the statutory framework of the CWA.⁴⁵ Part III examines the Final TMDL Rule and highlights the components that have created this legal and political battle.⁴⁶ Part IV analyzes the EPA's statutory authority under § 303 to include NPS pollution in the TMDL process.⁴⁷ In so doing, Part IV focuses on *Pronsolino v. Marcus*,⁴⁸ a recent district court decision of first impression that upheld the authority of the EPA and the states to identify waters polluted by NPS pollution and to identify TMDLs for these waters.⁴⁹ Part IV also considers the many policy issues that plague the regulation of NPS pollution and examines the overall feasibility of regulating NPS using the water quality standards approach of TMDLs.⁵⁰

42. *Id.* This irony is not surprising. House Republicans in the 1972 Congress insisted on the inclusion of the TMDL program in § 303 of the CWA. See *infra* notes 88-95 and accompanying text for a discussion of the legislative history of § 303.

43. See *NWF TMDL Factsheet*, *supra* note 30 (stating that "[t]he TMDL program is the ultimate locally-driven watershed clean up process").

44. See *supra* note 28 and accompanying text (discussing simple and efficient solutions for NPS pollution management).

45. See *infra* Part II (discussing NPS provisions in CWA statutory framework).

46. See *infra* Part III (discussing key provisions in Final TMDL Rule).

47. See *infra* Part IV (discussing arguments of the EPA and industry groups).

48. 91 F. Supp. 2d 1337 (N.D. Cal. 2000).

49. See *infra* notes 211-31 and accompanying text (discussing *Pronsolino*).

50. See *infra* Part V (discussing policy choices confronting Bush administration and states).

This Note ultimately concludes that the EPA has the statutory authority to include rivers polluted by NPS pollution in the TMDL process, but that the actual *regulation* of non-point sources must remain a power of the states.⁵¹ This distinction is essential, not only for the survival of the Final TMDL Rule, but for the future of the CWA. However, including waters affected solely by NPS pollution in the TMDL process is not the panacea for our nation's persistent water pollution problems. The success of the TMDL program requires strong financial and political support from President Bush and his administration.⁵² By supporting the TMDL program, President Bush can affirm his commitment to environmental federalism while truly reaching across political boundaries.⁵³ In so doing, President Bush will return America's water policy to the states, who themselves must make tough political decisions concerning the implementation and allocation of TMDLs. After almost three decades of denial, the time has come for the states to shoulder their statutory responsibility to address NPS pollution and work to realize the goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.⁵⁴

II. The CWA Statutory Framework

A. 1972 CWA: The Shift to Technology-Based Standards

There are two ways to address federal water pollution issues: water quality standards⁵⁵ and technology-based standards.⁵⁶ The passage of the 1972 CWA Amendments moved the nation from water quality-based regulation to technology-based regulation.⁵⁷ Prior to this legislation, federal and state water pollution laws relied primarily on a water quality-based approach that concentrated on creating water quality standards to establish the allowable level of pollution that may be present in a waterbody.⁵⁸ This water quality-based

51. See *infra* notes 115-18 and accompanying text (discussing distinction between inclusion of NPS and regulation of NPS).

52. See *infra* notes 286-301 and accompanying text (discussing TMDL policy and Bush administration).

53. See *supra* notes 42-44 and accompanying text (discussing political irony of TMDLs).

54. See 33 U.S.C. § 1251(a) (1994) (stating goal of CWA).

55. See Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 207 (1999) (stating that water quality-based standards are set at levels deemed necessary to protect human health and environmental quality, without regard to technological feasibility or environmental impact).

56. See *id.* (stating that "[t]echnology-based standards consider the economic and technological feasibility of pollution control strategies regardless of environmental impacts").

57. See HOUCK, *supra* note 14, at 12-14 (discussing initial failure of water quality standards to achieve success in federal law as impetus for technology standards of 1972 CWA).

58. *Id.*; see *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) ("Prior to 1972, Congress attempted to control water pollution by focusing regulatory efforts on achieving 'water quality standards,' standards set by the States specifying the tolerable

approach to pollution control proved ineffective, however, and in 1972, Congress made a dramatic shift to the technology-based standards as its major focus for water pollution prevention.⁵⁹

The lodestar of this technology-based approach was the mandate that the EPA create nationwide effluent limitations⁶⁰ for point sources⁶¹ based on available pollution control technology, while taking into account the costs and benefits of the limitations.⁶² The 1972 Amendments established a two-step process to apply these effluent limitations to point sources: (1) "best practicable control technology"⁶³ (BPT) and (2) "best available technology" (BAT).⁶⁴ The National Pollution Discharge Elimination System (NPDES), found in § 402 of the Act, implemented these standards. Note, however, that the NPDES permit system does not apply to NPS pollution. Thus, for over twenty years, the EPA has concentrated on these technology-based tools to regulate discharges from point sources, while allowing NPS polluters to remain largely unregulated.⁶⁵

degree of pollution for particular waters."); Lisa E. Roberts, Note, *Is the Gun Loaded This Time? EPA's Proposed Revisions to the Total Maximum Daily Load Program*, 6 ENVTL. LAW. 635, 639 (2000) (stating that "a water quality-based approach, such as the TMDL program, looks at all pollution sources involved and assesses their total effects on a waterbody").

59. See HOUCK, *supra* note 14, at 12-14 (discussing evolution of technology-based standards in federal environmental law); Roberts, *supra* note 58, at 638-40 (stating that Congress's initial water quality-based standards were ineffective because of problems with enforcement, inadequate science to collect accurate data, and unsuccessful administrative system).

60. An effluent limitation is a restriction "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." 33 U.S.C. § 1362(11) (1994).

61. Point sources are defined as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

62. *Id.* § 1314(b), § 1316(1)(B). EPA identifies technology-based restrictions on specific categories of point sources through rules known as effluent limitations guidelines. *Id.*

63. *Id.* § 1311(b)(1)(A); ENVIRONMENTAL LAW HANDBOOK 221 (Thomas F.P. Sullivan ed., 15th ed. 1999) (discussing 1972 CWA Amendments). The 1972 Amendments set forth the following requirements on point sources:

In the first phase, industrial dischargers were required to meet a level of pollutant control based on the application of the *best practicable control technology currently available* (BPT) by July 1, 1977 was to be implemented EPA sets BPT standards by surveying the particular industry to determine the types of treatment facilities typical of the industry and, with this information, determining the levels of pollution control achieved by the better-run facilities using the typical technologies.

Id.

64. 33 U.S.C. § 1311(b)(2)(A) (1994); see ENVIRONMENTAL LAW HANDBOOK, *supra* note 63, at 221 ("The second level of pollution control, to be achieved by July 1, 1983, was based on the *best available technology economically achievable* (BAT) BAT controls are intended to represent the maximum feasible pollution reduction for an industry.").

65. See HOUCK, *supra* note 14, at 3-4 (discussing successful regulation of point sources under CWA and subsequent growth in NPS pollution).

The EPA's lack of attention to NPS pollution was the product of limited agency resources and political will, rather than a lack of statutory tools that addressed NPS pollution.⁶⁶ In fact, Congress added the regional waste treatment plans of § 208⁶⁷ and the water quality standards of § 303 in the 1972 Amendments to address NPS pollution.⁶⁸ Additionally, Congress added § 319 to the Act in the 1977 Amendments to further address NPS problems.⁶⁹ The following section will analyze each of these programs individually to gain an understanding of the tools that Congress made available to the EPA and the states to address NPS pollution.

B. The NPS Pollution Toolkit: Management Plans, Management Practices – And TMDLs?

1. Section 208: Area-Wide Waste Treatment Management Plans

Section 208 requires that states and local governments develop area-wide waste treatment management plans (AWTMPs) that identify and control "agriculturally and silviculturally related nonpoint sources of pollution."⁷⁰ AWTMPs must be consistent with the water quality standards and implementation plans established in that state pursuant to § 303(e).⁷¹ Also, these plans must set forth procedures and methods to control NPS pollution to the extent feasible, and must be submitted to the EPA for approval.⁷² The states develop

66. See HOUCK, *supra* note 14, at 49 (stating reasons for EPA's lack of attention to § 303). Houck noted that:

[f]ollowing the passage of the FWPCA Amendments of 1972, EPA was fully occupied, indeed overwhelmed, in promulgating technology standards for point sources under the CWA and defending them in court. The Agency had little inclination, and indeed saw little reason, to implement the "safety net" features of § 303(d) before the technology requirements were in place.

Id. This single-minded approach was also the product of political influence. Senator Muskie, the principal author of the Senate bill that became the CWA, directed the EPA Administrator to "assign secondary priority" to § 303. *Id.* at 24.

67. 33 U.S.C. § 1288 (1994); see *infra* notes 70-78 and accompanying text (discussing § 208).

68. The TMDL program of § 303, as a whole, undoubtedly takes into account NPS pollution. This Note addresses the question of whether the TMDL program of § 303(d)(1) includes rivers solely affected by NPS pollution. For a discussion of the TMDL process and the differences between TMDLs created under § 303(d)(1) and § 303(d)(3), see *infra* notes 107-10 and accompanying text.

69. 33 U.S.C. § 1329 (1994); see *infra* notes 79-87 and accompanying text (discussing § 319).

70. 33 U.S.C. § 1288(b)(2)(F) (1994).

71. *Id.* § 1288(b)(3)(4)(A); see *infra* notes 112-15 and accompanying text (discussing § 303(e)).

72. 33 U.S.C. § 1288(b)(3), (4)(A) (1994).

these procedures, known as best management practices (BMPs),⁷³ which Congress in turn funds through federal grants under § 208(f).⁷⁴

In contrast to the NPDES system for point sources, the CWA provides no regulatory mechanism to control NPS pollution. Thus, the EPA's only implementation tool for NPS pollution under § 208 is the use of federal grants to encourage states to adopt BMPs.⁷⁵ This lack of regulatory power to enforce and implement AWTMPs prevented the § 208 planning approach from successfully diminishing NPS pollution.⁷⁶ The CWA's inability to achieve real gains in water quality led Congress to cease federal funding for § 208 plans in 1980.⁷⁷ Quite simply, "[s]tates were unwilling to provoke powerful agricultural constituencies with strict regulation when the Federal Government did not obligate them to do so."⁷⁸

2. Section 319: Nonpoint Source Management Programs

Congress added § 319 to the Act in the 1987 CWA Amendments.⁷⁹ Passed largely in response to the failure of § 208 to address adequately NPS pollution, § 319 was meant to implement NPS management programs as part

73. Congress amended § 208 in 1977, providing for a Rural Clean Water Program that offered financial incentives to landowners to implement BMPs. 33 U.S.C. § 1288(j)(2) (1994). BMPs are defined by the EPA as follows:

[m]ethods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

40 C.F.R. § 130.2(m) (1999).

74. 33 U.S.C. § 1288(f) (1994); *see also* *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 n.3 (9th Cir. 1990) (stating that § 208 provides for "financial incentives for farmers and other nonpoint source polluters to adopt management practices designed to reduce nonpoint source pollution"). This use of federal incentives to encourage state action is found frequently in federal environmental laws and has been declared constitutional. *See United States v. New York*, 505 U.S. 144, 167 (1992) (stating that Congress may attach conditions on receipt of federal funds).

75. *See Natural Res. Def. Council*, 915 F.2d at 1318 (discussing lack of federal implementation power for NPS pollution under § 208).

76. *See* Richard J. Lazarus, *Nonpoint Source Pollution*, 2 HARV. ENVTL. L. REV. 176, 185 (1977) (stating that "inherent weaknesses in section 208 demonstrate the need for more centralized control of the nonpoint program"); David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 524 (1996) (stating that states were unwilling to provoke powerful agricultural constituencies and that resulting NPS pollution control plans of § 208 were totally voluntary in forty-one states).

77. *See* Zaring, *supra* note 76, at 523 (discussing insufficiency of § 208 plans).

78. *Id.* at 524.

79. 33 U.S.C. § 1329 (1994).

of a "comprehensive nonpoint source pollution control program."⁸⁰ Section 319 requires states to submit an assessment report and management program proposal to the EPA for approval.⁸¹ The assessment report must identify navigable waters that cannot maintain water quality standards without further NPS pollution control.⁸² The management program proposal must include BMPs, programs to implement BMPs, and a schedule of annual implementation measures.⁸³

Despite its congressional fanfare, the management programs of § 319 have suffered from many of the same problems that prevented § 208 from being successful in combating NPS pollution. One commentator has said that § 319's "failings can be characterized as not enough carrot,⁸⁴ not enough stick,⁸⁵ and too much of the same planning imperatives that had characterized section 208."⁸⁶ In sum, because federal grants were unable to secure state implementation of the management plans, § 319 has failed to address the growing problem of NPS pollution.⁸⁷

3. Section 303(d): TMDLs

The failure of § 208 and § 319 to reduce NPS pollution has caused concerned citizens to turn elsewhere to seek protection for America's waters. The water quality standards and TMDLs of § 303(d) have surfaced as the tool of

80. *Id.* § 1329(h)(5)(D).

81. *See* Zaring, *supra* note 76, at 526 (discussing requirements of § 319) (citing 33 U.S.C. § 1329(a)(1)(A)-(B) (1994)).

82. *Id.*

83. *Id.*

84. *See id.* at 527 ("The failure of the carrot lies in the unwillingness of Congress to provide sufficient incentives to the states to initiate a strict pollution control program.").

85. *See id.* (discussing failure of § 208). Zaring stated:

Similar to Section 208, Section 319 does not require the states to implement non-point source pollution plans. Indeed, if states fail to submit a report, the statute merely shifts the responsibility to EPA to prepare and present a report to Congress, or provide assistance to a local public organization experienced with water pollution control.

Id. (citing 33 U.S.C. § 1329(d)(3), (e) (1994)).

86. *See id.* at 527-28 ("Section 319's requirements, while somewhat more specific, do not represent a major departure from the requirements of the unsuccessful section 208. State programs have largely remained voluntary.").

87. *See* THE CLEAN WATER ACT 20 YEARS LATER 241 (Robert W. Adler et al. eds., 1994) ("Implementation of 319 has failed to stem the flow of polluted runoff; the majority of state programs are ineffective and unfocused."); Roberts, *supra* note 58, at 647 ("Unfortunately, section 319 did not include criteria for EPA disapproval of the BMP plan, nor any other substantive EPA enforcement mechanism. Consequently, the program merely produced a volume of studies and a number of voluntary programs that resulted in little noticeable cleanup of NPS pollution.").

choice for these parties. This section examines both the legislative history and the statutory requirements of § 303(d).

a. The Legislative History

Congress ultimately included § 303(d) in the CWA to serve as a water-quality based "backup role where technology standards were insufficient to meet water quality goals."⁸⁸ The legislative history of the CWA indicates that the House of Representatives drafted § 303(d) as a calculated attempt to include a standards-based approach in the Act.⁸⁹ When the House drafted § 303(d), the Senate already had passed S. 2770, which contained all the major technology standards and permit requirements for point sources for which the CWA has become famous.⁹⁰ The Senate added § 303(d) to its bill because states and industrial dischargers believed that retaining a water quality-standards approach in the Act was critical to the continued success of industry by allowing water pollution issues to remain in the hands of local governments, which were thought to be sympathetic to local industries.⁹¹ The House committee report indicates that these interest groups made the argument that states possessed the expertise to run the water quality-standards based TMDL program.⁹² Interestingly, while not explicitly addressing whether § 303(d) should regulate NPS pollution, the House committee report recognized that "non-point sources of pollution are a major contributor to water quality problems."⁹³

When the House and Senate met in conference committee to reconcile their differing bills, the conferees reached a compromise that allowed the House version of § 303 to remain in the Act as long as its water quality

88. HOUCK, *supra* note 14, at 24 (citing H.R. CONF. REP. NO. 92-1465 (1972)).

89. *Id.* at 22.

90. *See id.* at 20-24 (analyzing legislative history of § 303(d)).

91. *See id.* at 20-21 (stating that state and industry views on environmental protection historically have influenced House and that House Members supported view that water should be regulated by local uses rather than by national effluent standards).

92. *Id.* at 23 (quoting H. REP. NO. 92-911, at 105 (1972)). The Report states the following:

The Committee heard extensive testimony during the oversight and legislative hearings to the effect that it is extremely difficult to apportion the discharge load from all point sources along a waterway or section of a waterway. However, testimony was also heard from the more experienced States that they already have this capability. The Committee feels that with appropriate support from the Administrator, the required analysis can be completed by the States in a timely fashion.

Id.

93. *Id.* (quoting H. REP. NO. 92-911, at 105 (1972)). For a discussion of the ultimate significance of this legislative history and the arguments made by parties attacking and supporting the Final TMDL Rule, see *infra* Part IV.

criteria and standards, TMDLs, and implementation plans became active only when technology standards were unable to meet state water quality goals.⁹⁴ Thus, the TMDL program found in § 303(d) of the CWA was a product of political compromise that was meant to serve as a "game plan for the next generation" and to return water pollution issues to local control once technology standards became ineffective.⁹⁵ For better or worse, the next generation has arrived, and the TMDL program of § 303(d) stands poised to enter the fray of federal water pollution regulation.

b. The TMDL Process

Section 303(d) provides the framework for establishing water quality-based effluent limitations through TMDLs.⁹⁶ Put simply, § 303(d)(1) requires that states engage in a three-part process: states must (1) identify all waters within the state for which certain technology-based discharge permits are insufficient "to implement any water quality standard;"⁹⁷ (2) compose a "priority ranking" of these impaired waters, "taking into account the severity of the pollution and the uses to be made of such waters;"⁹⁸ and (3) establish the "total maximum daily load" of "pollutants" that can be discharged into the water segment "at a level necessary to implement the applicable water quality standards . . ."⁹⁹ The first requirement in the TMDL process involves identifying those waters for which effluent limitations have been unsuccessful in meeting applicable water quality standards. Thus, prior to calculating a

94. See HOUCK, *supra* note 14, at 23-24.

95. *Id.* at 24 (citing telephone conversation with Gordon Wood, Minority Professional Staff Assistant to the House Committee on Public Works and primary drafter of § 303 of House bill (Mar. 28, 1997)).

96. See Karen M. Wardzinski et al., *Water Pollution Control Under the National Pollutant Discharge Elimination System*, in THE CLEAN WATER ACT HANDBOOK 8, 35-39 (Parthenia B. Evans ed., 1994) (discussing § 303(d) and TMDL program).

97. 33 U.S.C. § 1313(d)(1)(A) (1994). Section 303(d)(1)(A) states the following:

[e]ach 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 for such waters.

Id.

98. *Id.*

99. 33 U.S.C. § 1313(d)(1)(C) (1994). TMDLs must be set for "those pollutants which the Administrator identifies" as suitable for TMDL calculation. *Id.* The EPA has long stated that "all" pollutants are suitable for TMDL calculation. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1344 n.6 (N.D. Cal. 2000) (citing 43 Fed. Reg. 60,662 (Dec. 28, 1978)); see *infra* Part IV (discussing significance of this statutory language in debate over whether TMDLs should include NPS pollution).

TMDL, a state must determine the appropriate WQS that apply to each waterbody.¹⁰⁰ In adopting a WQS, the state defines the water quality goals of a waterbody by designating its intended uses.¹⁰¹ Additionally, the state adopts numerical or narrative criteria that specify the amounts of various pollutants that may be present in its waters without impairing the designated uses.¹⁰²

Once states have adopted the necessary WQS, they must create a prioritized list of waters that continue to violate these standards despite technology-based effluent limitations embodied in NPDES permits.¹⁰³ The state must submit this prioritized list, as well as the TMDLs for those waters on the list, to the EPA for approval.¹⁰⁴ If approved, the state then incorporates the lists and TMDLs into its "continuing planning process," which is required under § 303(e) of the Act.¹⁰⁵ If the EPA disapproves the list or any TMDLs, then the Administrator of the EPA has a statutory duty to identify such impaired waters and to establish proper TMDLs for these waters.¹⁰⁶

For all waters other than those identified under § 303(d)(1), § 303(d)(3) provides that states develop informational TMDLs that set load limits "at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife."¹⁰⁷ Unlike the TMDLs required by § 303(d)(1), states are not required to submit informational TMDLs to the EPA for approval.¹⁰⁸ The informational TMDLs of § 303(d)(3) are complementary to the mandatory TMDLs of § 303(d)(1) in that they ensure that all waters within a state receive adequate study and protection, regardless of whether they currently meet applicable WQS.¹⁰⁹ However, with respect to implementation measures and oversight by the EPA, there is a marked difference between mandatory TMDLs created under § 303(d)(1) and informational TMDLs created under § 303(d)(3). Only those TMDLs created under § 303(d)(1) are subject to the implementation plans, scheduling requirements, and the other forms of federal oversight that are present in the Final TMDL

100. 33 U.S.C. § 1313(c)(2)(A) (1994).

101. *Id.*; 40 C.F.R. 131.3(f), 131.6(a), 131.10 (2000).

102. 33 U.S.C. § 1313(c)(2)(A) (1994); 40 C.F.R. 131.3(b), 131.6(c), 131.11 (2000).

103. 33 U.S.C. § 1313(d)(2) (1994).

104. *Id.*

105. *Id.* § 1313(e). Section 303(e) imposes on states a duty to undertake "a continuing planning process" covering "all navigable waters" that must address "adequate implementation" of all water-quality standards, TMDLs, and other requirements. *Id.* This planning process also is subject to review by the Administrator of EPA. *Id.*

106. 33 U.S.C. § 1313(d)(2) (1994). This was the scenario in *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000), discussed *infra* Part IV.A.1.

107. 33 U.S.C. § 1313(d)(3) (1994).

108. *Id.*

109. *Id.*

Rule.¹¹⁰ As the unsuccessful histories of voluntary management programs under §§ 208 and 316 indicate, these forms of oversight are critical to ensuring that TMDLs result in real improvements to water quality. Consequently, it is only mandatory TMDLs, strengthened by the provisions of the Final Rule, that threaten to end decades of unregulated pollution by the NPS industries.

c. Framing the Issue

Like most major federal environmental laws, the CWA is made up of a number of sections that work together to accomplish the overarching goal of the statute.¹¹¹ The TMDL program of § 303(d) is part of a larger "continuing planning process" that is set forth in § 303(e) of the Act.¹¹² This continuing planning process requires states to adopt plans for all "navigable waters" within the state.¹¹³ These plans must include documentation that the state has adopted a number of measures to secure water protection, including: effluent limitations under § 301 sufficient to meet any applicable WQS; area-wide waste management plans under § 208; basin plans under § 209; and TMDLs under § 303(d).¹¹⁴ True to form, however, Congress did not provide the EPA with any specific regulatory powers to ensure the implementation of the NPS pollution provisions included in the § 303(e) plans.

Thus, § 303(e), like § 208 and § 319, fails to provide any federal regulatory authority to control NPS pollution.¹¹⁵ The EPA does not dispute this lack of federal power to directly *regulate* NPS.¹¹⁶ However, the EPA does have a potential opportunity to *include* rivers impaired solely by NPS pollution in the TMDL program of section 303(d)(1).¹¹⁷ As will be discussed in Part III, the stakes are high: the ability to include these impaired waters gives tremendous power to the EPA because for the first time, the major NPS polluters will be subject to the quantitative demands of the TMDL process as set forth in the Final Rule.¹¹⁸ The ultimate question, however, is whether waters polluted solely by NPS pollution fall within the "numerical targets and prescribed

110. For purposes of clarity, all references in this Note to "TMDLs" refer to mandatory TMDLs required under § 303(d)(1).

111. See generally Adler, *supra* note 55, at 206-07 (discussing similar frameworks of CWA and CAA).

112. 33 U.S.C. § 1313(e)(3)(C) (1994).

113. *Id.*

114. *Id.* § 1313(e)(3)(a)-(c) (1994).

115. See Brief of the Federal Appellees at 12-13, *Pronsolino v. Marcus* (9th Cir. 2000) (No. 00-16026, 00-16027) (9th Cir.) (on file with author) (discussing CWA's implementation tools).

116. *Id.*

117. HOUCK, *supra* note 14, at 168-69.

118. See *id.* at 167 (discussing benefits of TMDLs).

steps" of TMDLs mandated under § 303(d)(1) or whether these waters merely require informational TMDLs under § 303(d)(3).

III. The Final TMDL Rule

The NPS industries do not attack the EPA's Final TMDL Rule simply because it requires that the TMDL process include rivers polluted solely by NPS pollution.¹¹⁹ This requirement has been a part of the EPA's regulatory policy since it promulgated regulations implementing § 303(d)(1)'s listing and TMDL provisions in 1975.¹²⁰ The NPS industries attack the Rule because it includes *specific* measures that greatly increase the probability that the EPA's policy of including NPS pollution in the TMDL process finally will become a reality. Additionally, although the EPA has no statutory authority under the CWA to directly regulate NPS, some of the provisions in the Final TMDL Rule likely will increase the regulation of NPS by states and other federal agencies' policies and procedures.¹²¹ The following section will analyze the major provisions in the Rule relating to NPS pollution that have awakened the NPS industries and caused them to challenge the EPA's overall authority to include rivers polluted solely by NPS pollution in the TMDL process.

A. TMDL Implementation Plans

Section 130.32(c) of the Final Rule requires that states include implementation plans as essential elements of approvable TMDLs.¹²² The purpose of the implementation plan "is to provide a description, in a level of detail appropriate to the circumstances, of actions necessary to implement the

119. See Final TMDL Rule, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pt. 9) (stating that Final TMDL Rule "is based on identifying and implementing necessary reductions in both point and nonpoint sources of pollutants as expeditiously as practicable").

120. 40 C.F.R. § 131.11(b) (1976). These early regulations set forth the necessary elements of state water quality management plans and required lists of impaired waters and TMDLs for these waters. *Id.* Specifically, the regulations required states' water quality management plans to include an "assessment of existing and potential water quality problems within the approved planning area . . . including an identification of the types and degree of problems and the sources of pollutants (both point and nonpoint sources) contributing to the problems." *Id.*

121. See Final TMDL Rule, 65 Fed. Reg. 43,586, 43,588 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122-24, 130) (discussing EPA's lack of direct regulatory authority with TMDLs). The Final Rule states that:

[l]isting impaired waterbodies and establishing TMDLs for waterbodies impaired by pollutants from nonpoint sources does not mean any new or additional implementation authorities are created. Once a TMDL is established, existing State, Territorial and authorized Tribal programs, other Federal agencies' policies and procedures, as well as voluntary and incentive-based programs, are the basis for implementing the controls and reductions identified in TMDLs.

Id.

122. *Id.* at 43,668.

TMDL so that the waterbody attains and maintains water quality standards.¹²³ The EPA has set forth separate implementation plan requirements based on the type of pollutants that impair the waterbody. There are the following three categories: (1) waterbodies only impaired by point sources required to have an NPDES permit; (2) waterbodies impaired only by sources other than those required to have an NPDES permit including nonpoint sources; and (3) waterbodies impaired by a combination of both point sources required to have an NPDES permit and other sources including nonpoint sources (blended waters).¹²⁴ However, the Rule also includes some elements of implementation plans that are common to all sources, regardless of the nature of the impairment: (1) a schedule for implementation actions; (2) the date by which the implementation plan will attain water quality standards; (3) a modeling and/or monitoring plan; (4) a description of interim, measurable milestones and criteria to be used to determine progress towards attaining water quality standards; and (5) when the TMDL needs to be revised.¹²⁵

With specific regard to waters impaired solely by NPS pollution, the Final Rule requires that the implementation plan include elements designed specifically to address the NPS problem: (1) an identification of the individual sources of the pollutant that must be controlled to implement the load allocations; (2) a description of specific regulatory or voluntary actions that provide "reasonable assurance" that load allocations will be implemented and achieve the assigned load reductions; and (3) a "schedule" for implementing the management measures within five years when practicable.¹²⁶ Each of these elements represents a clarification or revision by the EPA of its current TMDL regulations to ensure the effective inclusion of NPS pollution in TMDLs.¹²⁷ It is necessary, therefore, to examine separately each requirement to determine its significance in the overall TMDL process.

1. Identification of Individual Pollutants

The implementation plan for waterbodies impaired only by nonpoint sources must include an "identification of the source categories, source sub-categories, or individual sources of the pollutant which must be controlled to implement the load allocations."¹²⁸ Within the previous sentence are two criti-

123. *Id.*

124. *Id.* at 43,625.

125. *Id.*

126. *Id.* at 43,668.

127. *See id.* at 43,586 (stating that purpose of revisions and clarifications in Final TMDL Rule is to create process for "identifying and implementing necessary reductions in both point and nonpoint sources of pollutants as expeditiously as practicable").

128. *Id.* at 43,668.

cal words for which the EPA has promulgated revised definitions in the Final Rule to ensure that TMDLs include NPS pollution. First, the EPA promulgated a definition of "pollutant" that is identical to the definition in the EPA's current NPDES regulations.¹²⁹ This definition also is identical to the definition of "pollutant" found in § 502(6) of the CWA, except that the Final Rule excludes certain radioactive materials from the definition.¹³⁰ Specifically, the Final Rule defines a "pollutant" as:

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.¹³¹

The importance of this new definition is that it clarifies the relationship between "pollutants" and "pollution" under § 303(d). The EPA interprets § 303(d) to require that TMDLs be established only when waters are impaired by "pollutants," which is a subset of waters affected by "pollution."¹³² Therefore, the EPA's new definition of "pollutant" emphasizes the belief that the TMDL process should include waters impaired by NPS pollutants like sediment, and the requirement that these pollutants be identified individually within the implementation plan furthers this commitment.¹³³

The second important definition with respect to identifying individual pollutants that the EPA revised in the Final Rule is "load allocation." Load allocation is defined in the Final Rule as "[t]he portion of a TMDL's pollutant

129. 40 C.F.R. 401.11(f) (2000).

130. *See Train v. Colo. Pub. Interest Research Group*, 426 U.S. 1, 25 (1976) (stating that Congress did not intend for materials governed by Atomic Energy Act to be included in category of pollutants subject to regulation by EPA under CWA).

131. Final TMDL Rule, 65 Fed. Reg. 43,586, 43,662 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130).

132. *See id.* at 43,592 (discussing differences between pollution and pollutants). The Final Rule notes that:

[p]ollution, as defined by the CWA, and the current regulations is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of a waterbody." This is a broad term that encompasses many types of changes to a waterbody, including alterations to the character of a waterbody that do not result from the introduction of a specific pollutant or the presence of pollutants in a waterbody at a level that causes an impairment. In other words, all waterbodies which are impaired by human intervention suffer from some form of pollution. In some cases, the pollution is caused by the presence of a pollutant, and a TMDL is required.

Id.

133. *See id.* (stating that states must develop TMDLs when landscape actions that result in introduction of sediment into waterbody, which is pollutant, results in impairment of waterbody).

load allocated to a nonpoint source, storm water source for which a National Pollution Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, ground water, or background source of pollutants."¹³⁴ Substantively, this definition is shorter than the existing definition of load allocation because the EPA has moved the technical requirements of how a load allocation is determined from the definition into the TMDL regulatory requirements of § 130.32 of the Final Rule.¹³⁵ In making this change, the EPA simplified the definition of load allocation to clarify its belief that pollutants from storm runoff not regulated under NPDES, as well as pollution from air deposition, must be accounted for in the load allocations.¹³⁶ These requirements ensure that these NPSs are included in TMDLs and represent the EPA's interpretation that "the CWA requires TMDLs to consider loadings from non-point sources."¹³⁷

2. "Reasonable Assurance"

Section 130.32(c)(2)(ii) requires that implementation plans for waterbodies impaired only by nonpoint sources contain "[a] description of specific regulatory or voluntary actions, including management measures or other controls, by Federal, State or local governments, authorized Tribes, or individuals that provide *reasonable assurance*, consistent with § 130.2(p), that load allocations will be implemented and achieve the assigned load reductions."¹³⁸ The Final Rule generally defines "reasonable assurance" as "a demonstration that TMDLs will be implemented through regulatory or voluntary actions, including management measures or other controls, by Federal, State, or local governments, authorized Tribes, or individuals."¹³⁹ With specific regard to nonpoint sources, the Final Rule requires the following:

the demonstration of reasonable assurance must show that management measures or other control actions to implement the load allocations contained in each TMDL meet the following four part test: they specifically apply to the pollutant(s) and the waterbody for which the TMDL is being established; they will be implemented as expeditiously as practicable; they will be accomplished through reliable and effective delivery mechanisms; and they will be supported by adequate water quality funding.¹⁴⁰

134. *Id.* at 42,662.

135. *See id.* at 43,667-68 (stating minimum elements of TMDL).

136. *Id.* at 43,662.

137. *Id.*

138. *Id.* at 43,668 (emphasis added).

139. *Id.* at 43,663.

140. *Id.*

Although the requirement of "reasonable assurance" does not impose a legal duty upon states actually to implement those management practices described in the implementation plan, the EPA does require states to meet the four-part "reasonable assurance" test for the EPA to approve the TMDL.¹⁴¹ Thus, the four-part "reasonable assurance" test is an essential requirement for TMDLs, and the EPA designed this test to ensure that states actually take measures to ensure that pollution levels meet the nonpoint source load allocations assigned in TMDLs.¹⁴² The EPA's requirement of "reasonable assurance" is a bold commitment on behalf of the agency to ensure that NPS pollution is reduced; therefore, it is one of the most contentious provisions in the Final Rule.¹⁴³ The following sections examine each part of the test to determine exactly what is required of states in demonstrating "reasonable assurance" of implementation.

a. Specific to the Pollutant and Waterbody

The first part of the four-part test for "reasonable assurance" for nonpoint sources requires that the management measure or control be specific to the pollutant or waterbody.¹⁴⁴ To satisfy this requirement, states must be able to point to information "showing that the management measure relied upon to achieve the reduction in the loading can reduce that pollutant."¹⁴⁵ This information must be "specific" to the pollutant, but it need not be new or additional site-specific information.¹⁴⁶ A state can rely on information from an existing federal or state program to satisfy this part of the four-part test.¹⁴⁷

141. See *id.* at 43,600 (describing "reasonable assurance" requirement). The EPA offers the following description of the legal ramifications of the "reasonable assurance" requirement:

By requiring such a demonstration of reasonable assurance before it may approve or establish a TMDL, EPA does not intend to create a mandatory duty or legal obligation that either the State, Territory, authorized Tribe or EPA implement those actions identified as providing reasonable assurance. The reasonable assurance demonstration is a "snapshot-in-time" identification of those voluntary and regulatory actions that the State . . . intends to take to ensure that the nonpoint source load allocations assigned in the TMDL will be realized Nothing in this rule, however, creates in EPA or the States new legal authority beyond that provided by existing . . . law to implement load allocations for nonpoint sources or creates for EPA, States, Territories or Authorized Tribes a mandatory duty to do so.

Id.

142. *Id.* at 43,600.

143. See EPA House Testimony, *supra* note 29, at 10 (stating that "reasonable assurance" requirement is new commitment to reducing nonpoint pollution).

144. Final TMDL Rule, 65 Fed. Reg. 43,586, 43,600 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130).

145. *Id.* at 43,599.

146. *Id.*

147. See *id.* (discussing ways in which states can satisfy reasonable assurance requirement).

b. *"As Expediently as Practicable"*

The second part of the four-part test for "reasonable assurance" for nonpoint sources requires that states implement management measures "as expeditiously as practicable."¹⁴⁸ This requirement ensures that states "will make nonpoint source controls implementing a TMDL for which there are no point sources subject to NPDES permits a high priority for nonpoint source program funding."¹⁴⁹ Thus, the "expeditiously as practicable" requirement functions as a constant reminder to states that addressing NPS pollution is a critical part of the TMDL process.

c. *Reliable Delivery Mechanisms*

The third part of the test for "reasonable assurance" for nonpoint sources requires that management measures be accomplished through "reliable and effective delivery mechanisms."¹⁵⁰ The EPA defines a "reliable delivery mechanism" as "the programmatic and administrative means by which the management measures and control actions will be implemented and monitored."¹⁵¹ Thus, the EPA requires states to show that the management measures they use to address NPS pollution actually will meet the load allocations that are set in individual TMDLs. However, these measures need not be "new"; existing voluntary and incentive-based federal and state nonpoint source programs can "be reliable and effective delivery mechanisms specific to the waterbody and pollutant for purposes of providing reasonable assurance."¹⁵² States must "explain how these programs will be implemented in the specific impaired waterbody and how they address the pollutant causing the impairment."¹⁵³

The Final Rule offers the following example:

[A] State may rely on a program that installs buffer strips to demonstrate reasonable assurance. In this example, the State would point to National Resource Conservation Service information showing that buffer strips are effective in mitigating erosion and thus can reduce loadings of the specific pollutant, *i.e.*, sediment. Also, the State would need to show which waterbodies within the watershed would receive buffer strips and explain the characteristic of these buffer strips.

Id.

148. *Id.* at 43,663.

149. *Id.* at 43,599.

150. *Id.* at 43,663.

151. *Id.* at 43,599.

152. *Id.* at 43,599. The EPA notes that approved nonpoint source programs under § 319 or existing conservation or water quality protection programs administered by the United States Department of Agriculture "which have demonstrated success in delivering water quality improvements in the past may be reliable delivery mechanisms for the purpose of § 130.2(p)."

Id.

153. *Id.*

d. Adequate Funding

The final requirement for "reasonable assurance" for nonpoint sources is that states demonstrate "adequate water quality funding" for the implementation of TMDLs.¹⁵⁴ "Adequate water quality funding" includes all federal funding of the CWA and some related federal, state, territorial, or authorized tribal funding.¹⁵⁵ If existing funding is not available to fully implement TMDL load allocations, states can satisfy the adequate funding requirement by explaining "when adequate funds will become available and the schedule by which these funds will be used to implement the TMDL load allocations."¹⁵⁶

3. Implementation Schedules

The third major requirement for implementation plans involving waters impaired solely by nonpoint sources is a "schedule, which is as expeditious as practicable, for implementing the management measures or other control actions to achieve load allocations in the TMDL within 5 years, when implementation within this period is practicable."¹⁵⁷ The EPA set this five-year target to ensure that states actually implement TMDLs within a specific time period.¹⁵⁸ However, these implementation schedules do not "add a new requirement beyond the requirement to establish reasonable assurance that management measures and/or control actions will be implemented as expeditiously as practicable."¹⁵⁹ Thus, if a state determines that a five year-target is not practicable, it can still receive EPA approval for its TMDL as long as it explains the basis for this determination.¹⁶⁰ Additionally, a state need only determine that it will implement its nonpoint management measures within

154. *See id.* at 43,663 (stating that states must demonstrate funding for "the implementation of the TMDL load allocations to the fullest extent practicable and in a manner consistent with the effective operation of its clean water program"). The EPA also imposes upon itself the requirement of showing adequate funding when it establishes a TMDL in the event a state fails to fulfill its TMDL obligations. *Id.*

155. *Id.* at 43,600.

156. *Id.* at 43,663. "EPA believes that such a schedule identifying when load allocations will be implemented as funding becomes available is necessary to provide reasonable assurance that load allocations will be achieved where adequate funding is not currently available." *Id.* at 43,600.

157. *Id.* at 43,668.

158. *See id.* at 43,626 ("EPA expects that the public believes that the TMDL will be quickly implemented following its establishment.").

159. *Id.*

160. *Id.* The EPA recommends that in making this determination of practicability, states consider "such factors as technical feasibility of installing controls and measures or changing practices within five years, competing program priorities in providing necessary funding and/or necessary technical assistance, and time to work with members of the affected community." *Id.*

five years to meet the scheduling requirement; it need not find that these measures will actually achieve the intended results within this time period.¹⁶¹

Although implementation schedules do not provide iron-clad legal guarantees that states will achieve significant reductions in NPS pollution, they are significant elements of TMDLs. First, the five-year target provides a realistic goal for states to implement their NPS management measures.¹⁶² Second, in the event a state cannot meet its goal, the schedule forces the state to explain publicly the reasons for failure.¹⁶³ For these reasons, the implementation schedules in the Final Rule greatly increase the likelihood that states actually will implement the load allocations in TMDLs so as to reduce NPS pollution.

B. Comprehensive Listing of Polluted Waters

Section 130.27 of the Final Rule requires a comprehensive four-part listing of a state's polluted waters.¹⁶⁴ Because the listing criterion in this section ultimately determines whether a state must develop a TMDL for a particular waterbody, it is necessary to understand exactly what is required for each part of the list. Part One of the list includes the following requirements: waterbodies impaired by one or more pollutant(s) as defined by § 130.32(d),

161. *Id.*

162. *See id.* (stating that EPA believes that states should implement TMDLs within five years). The Final Rule notes the following:

In general, EPA believes that, barring resource constraints or other impediments that make expeditious implementation impracticable, TMDLs can be implemented within five years of completion of the implementation plan. In the typical situation, the types of management measures that will be used to implement [] the TMDL will consist of a set of well-established practices that are commonly practiced within the affected industries and can be implemented within a five-year time frame.

Id.

The EPA offers a detailed list of examples of successful BMPs to support its assertion that a five-year period for implementation generally is attainable. To address soil erosion, the EPA believes that well-established practices "such as those that were used by USDA to implement the conservative compliance program on highly erodible cropland within the statutorily required five-year implementation period of 1985-1990 would typically be used." *Id.* To address the impact of grazing on water quality, the EPA believes that typical approaches would include a USDA "conservative management system" or other similar range management plan to reduce cattle's access to the stream, and to use grazing rotation strategies to reduce soil erosion. *Id.* To address the impact of silvicultural activities on water quality, the EPA believes that road maintenance practices that reduce erosion and provide shading will be common. *Id.* For urban runoff, the EPA suggests that typical approaches will include erosion and sediment control in new developments, continued treatment of post-development runoff with common BMPs, and protection and restoration of riparian areas. *Id.*

163. *See id.* at 43,626 ("If implementation requires more than five years, EPA believes that the public is entitled to an explanation as to why five years is not practicable.").

164. *Id.* at 43,665-66.

unless listed in Part 3 or Part 4 of the list; waterbodies impaired through biological information, unless it is determined that the impairment is not caused by one or more pollutants, in which case the waterbody can be listed on Part 2 of the list; waterbodies determined under § 130.32(c) implementation plans that a TMDL needs to be revised; and waterbodies listed pursuant to § 130.25(b) because it is anticipated they will become impaired by one or more pollutants.¹⁶⁵ TMDLs must be established for waters listed under Part One.¹⁶⁶

Part Two of the list includes "[w]aterbodies impaired by pollution as defined by § 130.2(c) but not impaired by one or more pollutants."¹⁶⁷ A TMDL is not required for waterbodies on Part Two of the list.¹⁶⁸ Part Three of the list must include:

[w]aterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained. The waterbody must be placed on Part 1 of the list and scheduled for establishment of a new TMDL if [the states] or EPA determine that substantial progress towards attaining the water quality standard is not occurring.¹⁶⁹

Part Four of the list is to include:

[w]aterbodies that are impaired, for which the State . . . demonstrates that water quality standards will be attained by the date of submission of the next list as a result of implementation of technology-based effluent limitations required by sections 301(b), 306, or 307 of the Clean Water Act or other controls enforceable by State . . . or Federal law or regulation (including more stringent water quality-based effluent limitations in NPDES permits). A TMDL is not required for waterbodies on Part 4. If a waterbody listed on Part 4 does not attain water quality standards by the time the next list is required to be submitted to EPA, such waterbody must be included on Part 1 unless [the State] can demonstrate that the failure to attain water quality standards is due to failure of point source dischargers to comply with applicable NPDES permit effluent limitations, which are in effect. TMDLs for waterbodies moved from Part 4 to Part 1 of the list must be scheduled for establishment in accordance with the requirements of § 130.28(b).¹⁷⁰

These comprehensive listing requirements go far beyond what was required of states under the current TMDL regulations. Under the current regulations, state lists had to include only those waters impaired by pollutants and

165. *Id.*

166. *Id.* at 43,666.

167. *Id.* For a discussion of the definition of "pollution" and "pollutants," see *supra* notes 129-33 and accompanying text.

168. *Id.*

169. *Id.*

170. *Id.*

still needing a TMDL.¹⁷¹ Although states only have to submit lists of impaired waters every four years under the Final Rule (instead of every two under current regulations), the comprehensive listing requirements greatly increase the likelihood that actual progress will be made in cleaning up impaired waters.¹⁷² Perhaps the most troubling provision in the listing requirements for NPS industries is the requirement that Part Three waterbodies be moved to Part One of the list if a state determines that the waterbodies do not show "substantial progress towards attaining the water quality standard."¹⁷³ The EPA will use the modeling and monitoring information required in the implementation plan provisions under § 130.32(c) to assess whether states have made an accurate determination that "substantial progress toward attaining water quality standards is being made and if not, the criteria for determining whether the TMDL needs to be revised."¹⁷⁴ Thus, the "substantial progress" requirement keeps states from using Part Four of the list as an escape hatch to prevent the establishment of TMDLs for those waters that are politically unpopular. The EPA is clear that "impaired waterbodies can only be placed on Part 4 of the list (1) if they are subject to technology-based requirements of the CWA or other enforceable controls, and (2) for one listing cycle."¹⁷⁵ By requiring "enforceable controls" for Part Four waters and limiting this listing to one cycle, the EPA has sought to ensure that states ultimately will establish TMDLs for all impaired waters, regardless of the political influence of local industries.

C. Schedules for Establishing TMDLs

Section 130.28 of the Final Rule requires that states develop a prioritized schedule for TMDL establishment that identifies when it will complete each

171. EPA House Testimony, *supra* note 29, at 7.

172. See Final TMDL Rule, 65 Fed. Reg. 43,586, 43,667 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130) (requiring states to submit list of impaired waters every four years); EPA House Testimony, *supra* note 29, at 7 (stating that existing requirement that states provide lists of polluted waters every two years was revised to provide for lists only every four years). For a discussion of criticism of this change, see *infra* note 189 and accompanying text.

173. Final TMDL Rule, 65 Fed. Reg. at 43,666.

174. *Id.* at 43,668.

175. *Id.* at 43,609. The EPA believes that Part 4 of the list "can be construed as an exception to the requirement that TMDLs must be established for all waterbodies impaired by a pollutant or pollutants," and thus this exception must be clearly limited. *Id.* The Final Rule notes the following:

Although EPA strongly supports the use of voluntary programs to resolve many impairment situations, EPA believes that enforceable controls will simplify the States . . . task of demonstrating that water quality standards will be attained within the relatively short period between listing cycles. Similarly, EPA believes that a clear cut endpoint to this exception is necessary to ensure that the enforceable controls are sufficient to attain water quality standards.

Id.

TMDL.¹⁷⁶ Prioritized schedules are required for all waterbodies and pollutant combinations on Part 1 of the § 130.27 comprehensive list.¹⁷⁷ States must schedule establishment of TMDLs "as expeditiously as practicable, evenly paced over the duration of the schedule," but no later than ten years from July 10, 2000, or ten years after the date of listing for waters listed after that date.¹⁷⁸ States can extend the schedule for one or more TMDLs for up to five years if the establishment of TMDLs within ten years is not practicable.¹⁷⁹ The schedules must identify each specific TMDL a state intends to establish and the one-year period in which each TMDL is scheduled for establishment. Also, "to the fullest extent practicable," states should provide for the coordinated establishment of TMDLs within a watershed to increase the efficiency and effectiveness of the TMDL process.¹⁸⁰

With regard to the prioritization of impaired waters, states must explain how they considered the severity of the impairment and the designated use of the waterbody in determining the schedules of TMDL establishment.¹⁸¹ Additionally, states must give higher priority to waters designated as sources of drinking water or that create habitat for threatened or endangered species, or explain to the EPA why a lower priority for these waters is appropriate.¹⁸² The EPA also offers a number of other factors for states to consider in scheduling waterbodies for TMDL establishment, including "the presence of sensitive aquatic species and . . . the historical, cultural, economic and aesthetic uses of the waterbody."¹⁸³

The ten to fifteen-year scheduling requirement for developing TMDLs is a major provision in the Final Rule. The current regulations merely require that states set priorities and identify those TMDLs that they expect to develop

176. *Id.* at 43,666.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* "Section 303(d) of the [CWA] . . . requires States to . . . both identify waters and establish a priority ranking for the identified waters as the first step in the process that is ultimately intended to result in the attainment of water quality standards." *Id.* at 43,612.

182. *Id.* at 43,666.

183. *Id.* The EPA offers a comprehensive list of additional factors in the Final Rule, including:

the value and vulnerability of particular waterbodies; the recreational, economic, and aesthetic importance of particular waterbodies; TMDL complexity; the degree of public interest and support; State, Territorial and authorized Tribal policies and priorities; national policies and priorities; or the efficiencies that might result from coordinating the establishment of TMDLs for multiple waterbodies located in the same watershed.

Id.

over the next two years.¹⁸⁴ The EPA's decision to require that states submit prioritized schedules as part of the § 303(d) list for approval or disapproval shows the importance of the scheduling requirement in the Final Rule.¹⁸⁵ In so doing, the EPA has greatly expanded the role of schedules in the TMDL process. Also, by requiring the states to identify a specific time frame within which they expect to develop each TMDL, the EPA has increased the opportunity for the public to participate in individual TMDLs that are of particular interest.¹⁸⁶ This increased public awareness undoubtedly will lead to more informed decision-making at the state and local level, and will help eliminate the undue political influence that NPS industries have traditionally had on local government.¹⁸⁷

184. EPA House Testimony, *supra* note 29, at 10.

185. See Final TMDL Rule, 65 Fed. Reg. 43,586, 43,612 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130) (stating that EPA's requirement that schedules be approved or disapproved is reasonable exercise of its discretion to ensure goals of § 303(d) are achieved and is consistent with its authority to adopt regulations under § 501(a)).

186. See *id.* at 43,612 (stating that schedules will allow citizens to "anticipate when work will happen on a particular TMDL that is of interest to them" and that public can comment on time frame in which state intends to develop each TMDL).

187. See HOUCK, *supra* note 14, at 131-47 (discussing lack of political will as contributor to failure of NPS programs in past). Professor Houck believed that thus far TMDLs have been unsuccessful because state and local governments have been ill-equipped to take on local industries:

They [TMDLs] vaporized on the will to do a very hard thing, to make demands on large, local industries without the backing of explicit federal standards and permits and the threat of federal enforcement. No state employee in his or her right mind would volunteer to take on the Florida sugar industry We are all human, and the path of least resistance toward nonpoint sources for the life of the CWA has been the happy land of planning, for which there was a steady (if thin) stream of federal funding and nothing was enforceable: a states-rights dream.

Id. at 143-44.

This lack of political will to reign in the NPS industries is nothing new in federal water policy. During the congressional hearings preceding the enactment of the 1972 Clean Water Act, industry groups strenuously argued to their respective Congressmen that water pollution control should remain in the hands of the states. *Id.* at 133-34. The influence of these industries was noted by John A. Blatnik (D-Minn.), Chair of the House Public Works Committee:

[They] are all men of good intentions, but they get beat over the head by powerful interests back home. I won't mention any names, but say somebody is from South Carolina or Georgia, and the Georgia Power Co., gets after them You can't find any finer men, or men of more integrity. But you can only go so far.

Id. (citing HARVEY LIEBERT, *FEDERALISM & CLEAN WATERS* 59 (1975) (quoting Janice Heard, *Environment Report: Water Pollution Proposals to Test Blatnik's Strength as Public Works Chairman*, 3 NAT'L J. 1719 (1971))).

*D. Criticism from the Other Side:
Contentious Revisions and Provisions Left Out of the Final Rule*

As with most major environmental policy decisions, both sides have attacked the Final Rule: industry groups argue that the regulations are too stringent, while environmental groups argue that the regulations are too lenient. Although the *American Farm Bureau* litigation involves primarily petitions for review by industry groups that disagree with the NPS pollution provisions of the Final Rule, two major environmental groups, Friends of the Earth (FOE) and the Water Keeper Alliance, intervened in the litigation as both petitioners and respondents to express both their criticism and approval of the rule.¹⁸⁸ Specifically, in their role as petitioners, these environmental groups disagree with a number of provisions in the Final Rule relating to the timeliness of the TMDL process. The environmental groups argue that the EPA acted unlawfully in: (1) setting a ten- to fifteen-year deadline for establishing TMDLs; (2) allowing itself over a year to either approve or disapprove a state's submission of its lists and TMDLs; (3) providing for extensions of up to four years to establish TMDLs once it has disapproved a state's submission for failing to include certain TMDLs; and (4) failing to include any deadline for EPA review of schedules for developing TMDLs.¹⁸⁹

In addition to these legal arguments, FOE and the Water Keeper Alliance also voiced opposition to the EPA's policy decision to remove provisions in the proposed rule relating to the regulation of specific discharges from forestry operations as point sources under the NPDES permitting system.¹⁹⁰ The EPA chose to exclude this forestry provision from the Final Rule in an attempt to placate industry experts and economists from the General Accounting Office

188. See *Water Pollution: Nine Petitions for Review Filed Challenging EPA Final Rule Revising TMDL Program*, Chem. Reg. Daily (BNA) (Dec. 11, 2000), available at WL 12/11/2000 CHR D6 ("Joan Mulhern, an Earthjustice attorney, said it is not unusual for groups to file both as petitioners and intervenors, especially when the rules are as complex as the TMDL revisions."). FOE and the Water Keeper Alliance are represented jointly by Earthjustice. *Id.*

189. Statement of Issues of Friends of the Earth, et al., Petitioners in No. 00-1475, Am. Farm Bureau Fed'n v. Browner (D.C. Cir. filed Dec. 12, 2000) (No. 00-1320 (and consolidated cases 00-1341, 00-1353, 00-1384, 00-1468, 00-1475, 00-1478, 00-1491, 00-1496)) (on file with author); see also *Activists Denounce Democrats' Support for Impaired Waters Rule*, INSIDE EPA, Aug. 25, 2000, at 5 (stating that small number of environmental groups, including Earthjustice and FOE, disagree with House Democrats' support for Final TMDL Rule). In the political turmoil that arose after the Final Rule was signed, Friends of the Earth and Earthjustice initially opposed political support for the Rule because of their belief that the ten- to fifteen-year scheduling provision postpones TMDLs for "another generation." *Id.* at 6.

190. *Water Pollution: Forestry Exemption for TMDL Proposal Gets Tepid Response from Industry, Others*, Chem. Reg. Daily (BNA) (June 12, 2000), available at WL 6/12/2000 CHR D8 [hereinafter *Forestry Exemption Response*] (stating that Earthjustice was not satisfied with agreement between EPA and U.S. Department of Agriculture that entailed withdrawing forestry provisions in Final Rule).

(GAO) that raised concerns about the cost of the proposed regulations on forest operators.¹⁹¹ Rather than including the forestry provision, the EPA made an agreement with the U.S. Department of Agriculture that allows forestry operations that maintain BMPs consistent with future EPA guidance to avoid the NPDES permitting process.¹⁹² An attorney for Earthjustice described the EPA's decision to remove the silviculture provisions from the Final Rule as "serious backpedaling" on what was already a "modest proposal."¹⁹³

Interestingly, the EPA's decision to remove the forestry provision did not even satisfy the major silviculture industries. The American Forest and Paper Association, a major silviculture industry group and current respondent in the *American Farm Bureau* litigation, viewed the removal of the forestry provision as an unsatisfactory attempt by EPA to gain favor for the Final Rule among industry groups.¹⁹⁴ While FOE and the Water Keeper Alliance use their role as petitioners to voice disagreement with certain provisions in the Rule, these groups also strongly defend the Rule on behalf of the EPA.¹⁹⁵ FOE, the Water Keeper Alliance, and the Sierra Club have intervened successfully as respondents "to oppose petitioners' attempt to weaken the TMDL regulations promulgated by EPA."¹⁹⁶ In an attempt to prevent industry groups

191. See EPA House Testimony, *supra* note 29, at 6 ("Much of the concern about costs was based on assertions by some economists that the rule would require forest operators to significantly increase spending to control pollution from forestry activities. This provision of the proposed rule is not included in the final rule.").

192. *Forestry Exemption Response*, *supra* note 190; see also U.S. EPA, Joint Statement of the Department of Agriculture and the Environmental Protection Agency Addressing Agricultural and Silvicultural Issues Within EPA Revisions to TMDL and NPDES Rules, May 1, 2000, available at <http://www.epa.gov/owow/tmdl/tmdlwhit.html> (last visited Feb. 4, 2002) (discussing EPA's revisions in Final Rule relating to forestry and agriculture issues).

193. *Forestry Exemption Response*, *supra* note 190 (quoting Joan Mulhern).

194. See *id.* (discussing industry response to EPA's decision to remove forestry provision). Derek Jumper, the spokesman for the American Forest and Paper Association, believes the exemption does not address the effect of the Final Rule on landowners who may want to sell timber to logging companies. *Id.* Additionally, "[t]he exemption also does not address the concerns the industry has on its manufacturing side." *Id.*

195. See Motion to Intervene, Proposed Intervenor-Respondents Sierra Club, Friends of the Earth, and Water Keeper Alliance, *Am. Forest & Paper Ass'n v. EPA* (D.C. Cir. motion dated Aug. 29, 2000) (No. 00-1353) [hereinafter *Sierra Club Motion to Intervene*] (on file with author) (discussing motive for seeking to intervene). Earthjustice offers the following explanation of its position:

Although intervenor-applicants did not agree with many of EPA's proposed changes, most particularly disagreeing with the long timeframe allowed for states to prepare TMDLs for polluted waters and EPA's assertion that it had a discretionary as opposed to mandatory duty to establish TMDLs when a state failed to do so, their comments reflect their support for a strong and effective TMDL program.

Id. at 4.

196. *Id.* at 8; Order Granting Intervention, *Am. Forest & Paper Ass'n v. Browner* (D.C. Cir. order filed Dec. 19, 2000) (No. 00-1320) (on file with author).

from "under[cutting] gains made by Sierra Club at the agency level," these environmental groups assert that the EPA has the authority to: (1) set the ten- to fifteen-year time-frame for establishing TMDLs; (2) establish TMDLs when states fail to do so; and (3) include nonpoint sources in the TMDL program.¹⁹⁷ Thus, although environmental groups are not satisfied completely with the Final Rule, some understand that it represents "the best chance to clean up polluted waters in an equitable manner."¹⁹⁸ For this reason, the environmental community strongly defends the EPA's authority to include NPS pollution in the TMDL process.¹⁹⁹

The Final TMDL Rule contains a number of very complex provisions that affect a number of interested stakeholders. The fact that Earthjustice intervened as both a petitioner and a respondent is a reminder that environmental policy decisions rarely are embraced universally by the many parties that seek to influence agency decision-making. In promulgating the Final Rule, the EPA stirred the calm waters that have protected the NPS industries for the past three decades.²⁰⁰ In so doing, the EPA did not announce draconian measures mandating the federal regulation of agricultural and silvicultural runoff.²⁰¹ Rather, as the decision to remove the forestry provision indicates, the EPA sought compromises with interested stakeholders and promulgated

197. Sierra Club Motion to Intervene, *supra* note 195, at 5-7, 9.

198. *Water Pollution: EPA Plans to Move Forward With Issuance of TMDL Rule Despite Obstacles, Fox Says*, Chem. Reg. Daily (BNA) (May 24, 2000), available at WL 5/24/2000 CHR D2 (discussing comments of Nina Bell, executive director of Northwest Environmental Advocates, environmental group that has successfully intervened as respondent to support EPA). Unlike national environmental groups like Friends of the Earth and Earthjustice who initially were opposed to the Rule because of disagreements over timing issues, most regional environmental groups consistently have supported the Rule. See *Water Pollution: Municipal Officials Urge Advocates to Back Off Opposition to TMDL Proposal*, Chem. Reg. Daily (BNA) (June 9, 2000), available at WL 6/9/2000 CHR D6 (discussing reactions of AMSA and various environmental groups to proposed TMDL Rule). AMSA also has been a consistent supporter of the Rule. *Id.* In a letter to a number of national environmental groups, including FOE and Earthjustice, AMSA "agreed that the proposal . . . is not perfect," but urged the groups to support the Rule because "the proposal would put more responsibility for water quality impairment on nonpoint sources of pollution." *Id.*

199. Respondents from the environmental community include the Sierra Club, Friends of the Earth, Water Keeper Alliance, Northwest Environmental Advocates, Center for Marine Conservation, National Wildlife Federation, Southern Environmental Law Center, and Trout Unlimited. Order Granting Intervention, *Am. Forest & Paper Ass'n v. Browner* (D.C. Cir. order filed Dec. 19, 2000) (No. 00-1320) (on file with author).

200. See HOUCK, *supra* note 14, at 4-5 (discussing lack of regulation of NPS industries).

201. See U.S. EPA, *Final TMDL Rule: Fulfilling the Goals of the Clean Water Act*, available at <http://www.epa.gov/owow/tmdl/finalrule/factsheet1.html> (last visited Feb. 4, 2002) (stating that under Final Rule, "[s]tates have maximum flexibility to make their own choices about which sources of pollution to clean up, and in what manner, and to produce their own plans for local cleanups to ensure the full protection of public health").

a reasonable regulation that respects "state primacy for ambient-based water pollution control."²⁰²

It is not surprising, however, that the NPS industries did not quietly accept the Final Rule. Having grown accustomed to remaining virtually free from any federal oversight under § 319 voluntary programs, the implementation plans and "reasonable assurance" requirements of the Final Rule were a rude awakening.²⁰³ Now that these industries realize that the Final Rule might enable states to make real gains in decreasing NPS pollution, they have turned to the D.C. Circuit to strike down the Final Rule.²⁰⁴ But, the NPS industries are seeking much more than a ruling striking down certain provisions in the Rule. They challenge the EPA's overall statutory authority even to include NPS pollution in the § 303(d)(1) TMDL process.²⁰⁵ Because NPS pollution has become the largest contributor to water quality problems in the nation, the EPA's ability to include nonpoint sources in TMDLs is a central question, both for the survival of the Final TMDL Rule and for the ultimate ability of the CWA to continue to meet its goal of maintaining and preserving America's waters.²⁰⁶ The following section analyzes the legal arguments surrounding this issue to determine whether the EPA has the statutory authority under the CWA to include rivers impaired solely by NPS pollution in the TMDL process.

IV. Analyzing the Arguments: Should the Final TMDL Rule Survive?

A. TMDLs and NPS Pollution

In *American Farm Bureau Federation v. EPA*,²⁰⁷ the majority of Petitioners argue that the EPA exceeded its authority in promulgating provisions in

202. HOUCK, *supra* note 14, at 168.

203. See *supra* notes 119-87 and accompanying text (discussing key provisions in Final Rule).

204. See *infra* notes 232-68 and accompanying text (discussing *American Farm Bureau* litigation).

205. See HOUCK, *supra* note 14, at 60-63 (discussing argument for including NPS pollution in TMDLs). Professor Houck noted:

It is no secret to any observer of the CWA that the primary reason for this mushrooming problem [of NPS pollution] is the fact that while other sources have been abated through required controls and their enforcement, no comparable controls or enforcement have been applied to agriculture, silviculture, and the rest of the nonpoint world. Enter, now, TMDLs, with the potential for specific, quantified load allocations (i.e., reductions) from nonpoint sources. The nonpoint world quakes. And reacts.

Id. at 60-61.

206. See *supra* notes 4-8 and accompanying text (discussing extent of NPS pollution in United States).

207. No. 00-1320 (D.C. Cir. filed July 18, 2000) (on file with author).

the Rule that include implementation plans, "reasonable assurance" requirements, implementation schedules, listing requirements, and scheduling requirements.²⁰⁸ As previously discussed, each of these provisions greatly increases the likelihood that states will achieve significant reductions in NPS pollution through the TMDL program.²⁰⁹ However, if the EPA does not have the general statutory authority to include NPS pollution in TMDLs, each of these provisions, and ultimately the entire TMDL program, is meaningless.²¹⁰ Thus, although the NPS industries attack the lawfulness of various provisions of the Rule, the major issue in the *American Farm Bureau* litigation is one of scope: whether the EPA has the statutory authority under the CWA to mandate that § 303(d)(1) TMDLs include load allocations for NPS pollution.

I. Pronsolino v. Marcus

Courts only recently have considered the issue of whether the EPA has authority under § 303(d)(1) to require that states develop TMDLs for waters impaired solely by NPS pollution. In a matter of first impression, the District Court for the Northern District of California held in *Pronsolino v. Marcus* that § 303(d) of the CWA authorized the EPA to determine a TMDL for a river polluted solely by logging runoff and other NPS pollution after the State of California failed to timely establish a TMDL for the river.²¹¹ In *Pronsolino*, AFBF and other agriculture and timber groups argued on behalf of plaintiff landowners who were subject to land use restrictions by the California Department of Forestry (CDF) as part of a permit to harvest timber.²¹² CDF included these restrictions in the plaintiffs' timber permit to ensure that sediment levels in the Garcia River did not exceed load allocations for a TMDL established by the EPA after California failed to submit a TMDL for the river.²¹³ The

208. See Statement of Issues to be Raised, *Am. Forest & Paper Ass'n v. EPA* (D.C. Cir. filed Sept. 11, 2000) (No. 00-1353 (and consolidated petitions No. 00-1320)) (on file with author) (outlining Petitioners' issues).

209. See *supra* notes 119-87 and accompanying text (analyzing major provisions of Final Rule).

210. See HOUCK, *supra* note 14, at 135-36 ("If nonpoint sources are held to be beyond the mandatory provisions of this section [303(d)], they will be relegated to the essentially ineffectual planning exercises that have characterized the last 25 years in nonpoint source control.").

211. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1356 (N.D. Cal. 2000), *appeal docketed*, No. 00-16026 (9th Cir. May 24, 2000).

212. See *id.* at 1338-40 (discussing facts of case).

213. See *id.* at 1339 (discussing TMDL history of Garcia river). The history of the TMDL program in California mirrors that of most states in that it has been driven solely by litigation. See also Conway, *supra* note 5, at 93-97 (discussing TMDL litigation). Although § 303(d) required the states and EPA to identify impaired waters and establish TMDLs for these waters in 1972, California failed to assume its statutory responsibility for the TMDL program until environmental groups sued the EPA in the late 1990s to demand that it list waters and develop TMDLs under § 303. *Pronsolino*, 91 F. Supp. 2d at 1339. The establishment date for the

Plaintiffs argued that § 303(d)(1)(A) does not explicitly include NPS pollution in the TMDL process; thus, the EPA exceeded its authority in developing a TMDL for the Garcia River, which is impaired solely by sediment and other NPS pollution from timber harvesting.²¹⁴

After engaging in an extensive study of the legislative history and structure of the CWA, the *Pronsolino* court held that Congress directly addressed the precise question at issue and that the EPA has the statutory authority to include NPS pollution in TMDLs.²¹⁵ In reaching this conclusion, the court relied upon three distinct findings.²¹⁶ First, the court found that "the statutorily defined-role of the TMDL is inconsistent with plaintiffs' argument."²¹⁷ The court determined that the statutorily-defined role of TMDLs was to provide data for each state's continuing planning process under § 303(e), and that plaintiffs' argument for excluding NPS pollution from TMDLs did not comport with this comprehensive use.²¹⁸ Additionally, the court found that it

Garcia River TMDL was set by the EPA after entering into a consent decree with environmental groups. *See id.* (citing Consent Decree, *Pac. Coast Fed'n of Fishermen's Ass'n v. Marcus* (N.D. Cal. Mar. 6, 1997) (No. 95-4474 MHP)). After California failed to meet this deadline, EPA fulfilled its statutory duty under § 303(d)(2) and its legal obligations under the consent decree and released its own TMDL for the Garcia River. *Id.*

214. *See Pronsolino*, 91 F. Supp. 2d at 1346 (summarizing Plaintiffs' argument of statutory construction). "Plaintiffs base their arguments on the fact that effluent limitations – which apply only to point sources – are referenced in the listing requirement of Section 303(d) whereas no reference is made to nonpoint sources." *Id.* Specifically, § 303(d)(1)(A) requires that "[e]ach state shall identify those waters within its boundaries for which the effluent limitations required by Section 301(b)(1)(A) and 301(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." *Id.* (quoting 33 U.S.C. § 1313(d)(1)(A)).

215. *See id.* at 1347 n.12 (stating "that Congress has directly spoken to the precise question at issue," and therefore, there is "no need to resort to supplemental aids of construction" (citing *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984))).

216. *Id.* at 1346-47. It should be noted that the court actually gave four reasons for its holding. The fourth reason asserted by the court was that although the Ninth Circuit had not decided the precise issue raised, case law supported the view that the TMDL process covers nonpoint sources. *See id.* at 1347-49 (discussing case law); *see also Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (stating that "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources"); *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994) (stating that Congress and EPA have determined that TMDLs are "effective tool[s] for achieving water quality standards in waters impacted by non-point source pollution"). However, because the court explicitly based its holding on the first three reasons, finding that the statute clearly spoke on the issue under a *Chevron* step-one analysis, this Note omits discussion of this case law. *See Pronsolino*, 91 F. Supp. 2d at 1347 n.12 (citing *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *infra* note 256 and accompanying text (explaining two-step test established in *Chevron*).

217. *Pronsolino*, 91 F. Supp. 2d at 1347.

218. *See id.* at 1346 (stating that § 303(e) was "pertinent to nonpoint-source regulation (as well as to any state-administered NPDES program)"). For a discussion of the components of § 303(e), *see supra* notes 105-06 and accompanying text.

would be implausible to set TMDLs at levels that would meet applicable WQS without taking into account both point and nonpoint sources of pollution.²¹⁹ In making this finding, the court surmised that the plaintiff's argument to exclude NPS pollution from TMDLs would "frustrate the 'comprehensive approach'" to water pollution adopted in the 1972 CWA.²²⁰

Second, the court found that plaintiff's argument did not comport with the statutory framework of § 303(d).²²¹ After analyzing the statutory language of the first sentence of § 303(d)(1)(A), which requires states to "identify those waters within its boundaries" for those effluent limitations that are not stringent enough to meet applicable WQS, the court concluded that the TMDL program applies to all substandard waters within a state.²²² Thus, in reaching this conclusion, the court found as a matter of statutory interpretation that § 303(d) calls for the identification of all substandard navigable waters within a state, regardless of the source of pollution.²²³

Third, the court found it insignificant that Congress did not explicitly mention NPS pollution in § 303(d). The Plaintiffs argued that the absence of any language referring to NPS pollution in § 303(d)(1) expressly limits the scope of waters subject to TMDLs to waters receiving discharges; thus, Congress intended TMDLs to aid only in the development of more stringent regulations for point sources.²²⁴ In rejecting the plaintiffs' argument, the court found that the 1972 Act created a drastic change in federal water regulation via technology-based effluent limitations and that the purpose of the water-quality standards of § 303 was to assess "the unfinished business expected to remain even after application of the new cleanup strategy."²²⁵ Therefore, the court found it "obvious" that excluding the large number of rivers polluted solely by NPS pollution would render the TMDL program ineffective and would leave "state agencies guessing at how to allocate the burden of cleanup between point and nonpoint contributions of the same pollutant."²²⁶

219. *See id.* at 1346-47 (stating that meeting applicable WQS "would have been impossible to do . . . without taking any nonpoint sources into account as well as any point sources").

220. *Id.* at 1347 (quoting *Natural Res. Def. Council v. Fox*, 909 F. Supp. 153, 156 (S.D.N.Y. 1995)).

221. *See id.* (stating that plaintiff's argument "is inconsistent with the logic expressed in Section 303(d)").

222. *See id.* (quoting 33 U.S.C. § 1313(d)(1)(A)(1994)) (stating that starting point for TMDL program is "each and every substandard navigable water within the boundaries of the state").

223. *See id.* ("Since all rivers and waters regardless of pollution source were included in the universe for which water-quality standards were required, all of them – again, regardless of source of pollution – were included in the universe for which listing and TMDLs were required – save and excluding only those for which effluent limitations would be sufficient to achieve compliance with standards.").

224. *Id.* at 1346.

225. *Id.* at 1347.

226. *See id.* ("In calling for such a list [of waters impaired after the use of effluent limita-

As a result of the previous findings, the *Pronsolino* court entered summary judgment in favor of the EPA, thus affirming its statutory authority to include rivers polluted solely by NPS pollution in the requirements for TMDL listing and development.²²⁷ To date, *Pronsolino v. Marcus* stands as the sole decision that interprets the EPA's authority to include NPS pollution in TMDLs under § 303. However, the plaintiffs have appealed the district court's decision in *Pronsolino* to the Ninth Circuit and argue that the court erred in its interpretation of § 303.²²⁸ Interestingly, the arguments briefed before the Ninth Circuit in the *Pronsolino* appeal mirror those asserted by Petitioners in the *American Farm Bureau* litigation.²²⁹ This similarity is not surprising considering that both cases directly address whether EPA possesses the statutory authority to include NPS pollution in TMDLs.²³⁰ Thus, the *Pronsolino* decision and its subsequent appeal provide valuable insight into the ultimate fate of the Final TMDL Rule. Using the briefs submitted by EPA and AFBF in the *Pronsolino* appeal as guideposts, the following section analyzes the anticipated arguments of these parties with respect to the litigation involving the Final TMDL Rule.²³¹

2. American Farm Bureau Federation v. EPA

a. AFBF's Argument for Exclusion

The AFBF argues that waters impaired solely by NPS pollution should be excluded from the TMDL process because Congress did not grant the EPA

tions], it was unnecessary to reference nonpoint pollution. Any polluted waterway – whether its sources were point, nonpoint or a combination – had to be listed if it would not be cleaned by the new approach.”). The court also found that excluding NPS pollution from TMDLs would render § 303(e) state plans ineffective because TMDLs were meant to provide the necessary data for these comprehensive plans. *Id.*

227. *Id.* at 1356.

228. See Opening Brief of Plaintiffs-Appellants at 11-14, *Pronsolino v. Marcus* (9th Cir. filed Sept. 25, 2000) (Nos. 00-16026, 00-16027) (on file with author) (giving summary of argument).

229. See *id.* at 2 (outlining issues in *Pronsolino* appeal); Petitioners' Statement of Issues to Be Raised, *supra* note 32 (outlining issues in *American Farm Bureau* litigation).

230. See Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 2-3 (outlining issues in *Pronsolino* appeal); Petitioners' Statement of Issues to Be Raised, *supra* note 32 (outlining issues in *American Farm Bureau* litigation). Additionally, the attorneys representing the AFBF in the *Pronsolino* appeal also are representing AFBF in its petition for review of the Final Rule. See Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 62 (listing attorneys submitting brief in *Pronsolino* appeal); Petitioner's Brief in Opposition to the Motion for Leave to Intervene of the Association of Metropolitan Sewerage Agencies at 11, *Am. Farm Bureau Fed'n v. Browner* (D.C. Cir. filed Oct. 10, 2000) (No. 00-1320 and consolidated cases) (on file with author) (listing attorneys submitting motion in Final Rule litigation).

231. As of the writing of this Note, briefs had not been filed in the *American Farm Bureau* litigation.

authority to include such waters when it enacted § 303(d)(1) of the CWA.²³² To support this assertion, AFBF offers four main arguments.²³³ First and foremost, AFBF analyzes the language of § 303(d)(1) and argues that the text and structure of the CWA demonstrates that mandatory TMDLs do not apply to waters impaired solely by NPS pollution.²³⁴ With regard to the scope of TMDLs under § 303(d)(1)(A), AFBF makes the following argument:

That provision applies by its plain terms only to a subset of such [impaired] waters, namely those 'for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters.' Because effluent limitations apply by definition only to [point source] pollution, waters not impaired by [point source] pollution are not subject to effluent limitations and not within the scope of section 303(d)(1).²³⁵

Alongside this textual argument, AFBF asserts that the structure of the CWA suggests that TMDLs under § 303(d)(1) should not include waters impaired only by NPS pollution.²³⁶ AFBF believes that because § 303(d)(3) informational TMDLs, § 208 WTMPs, and § 319 voluntary programs are "more suited to the diffuse nature of NPS pollution," TMDLs should not be used to address NPS pollution.²³⁷

232. Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 11.

233. It should be noted that AFBF also argues that while no court has "specifically addressed whether § 303(d)(1) applies to NPS-only impaired waters," Ninth Circuit case law supports "the plain meaning" of § 303(d)(1) and preclude[s] application of its TMDL process to NPS-only impaired waters." *See id.* at 48-53 (discussing case law); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) (stating that § 303 "does not itself regulate nonpoint source pollution"); *Or. Natural Res. Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.12 (9th Cir. 1987) (stating that NPS pollution is addressed in §§ 208 and 319 of CWA). An analysis of this argument has been omitted due to the fact that although the *Prosolino* court discusses these cases, the court expressly based its holding on factors other than case law. *See supra* note 216 and accompanying text (citing case law that supports inclusion of NPS pollution).

234. Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 16-29.

235. *Id.* at 11-12. In making this textual argument, AFBF asserts that because § 303(d)(1) refers to waters failing to meet applicable WQS after the imposition of effluent limitations incorporating the relatively lax standard of BPT, "Congress intended TMDLs to aid in the development of additional and more stringent regulation of [point source] pollution." *Id.* at 12. Considering that metropolitan sewerage agencies are one of the largest groups of point source dischargers in the country, it is not surprising that AMSA fiercely rejects this argument.

236. *See id.* at 13 (discussing legislative history of § 303(d)). AFBF argues that the legislative history "confirms that Congress enacted section 303(d)(1) to enable more effective regulation of [point source] pollution, specifically designating section 208 to address NPS pollution. Nowhere in the Congressional reports or debates is there any suggestion that § 303(d)(1) would apply to NPS pollution." *Id.*

237. *Id.* at 12-13.

AFBF bases its second major argument on an analysis of the legislative history of the CWA. AFBF argues that the absence of specific language referring to NPS pollution in the legislative history of the Act suggests that Congress intended § 303(d) to increase effluent limitations on point sources, rather than address NPS pollution.²³⁸ AFBF also argues that it is illogical that Congress would have added § 319 in the 1987 Amendments to address NPS pollution if TMDLs were meant to address this issue.²³⁹

Third, AFBF asserts that the EPA's administrative history with regard to § 303(d)(1) demonstrates that until recently, the EPA believed that TMDLs applied only to point source-impaired waters.²⁴⁰ Citing the EPA's failure to address NPS pollution through TMDLs for over thirty years, AFBF argues that the EPA has changed its interpretation of the statute in the face of increased litigation over TMDLs.²⁴¹ Therefore, AFBF argues that such a "revisionist administrative history" does not entitle the EPA's current interpretation to any deference by the courts.²⁴²

Fourth, AFBF argues that an interpretation of § 303(d)(1) that precludes mandatory TMDLs for NPS-impaired waters is "perfectly logical."²⁴³ In making this argument, AFBF asserts that excluding NPS pollution from mandatory TMDLs comports with the comprehensive purpose of the CWA by allowing separate sections of the Act to address different forms of pollution.²⁴⁴ AFBF insists that a plain meaning interpretation of § 303(d) reveals that the states and the EPA should only address NPS pollution under § 208 and § 319 of the Act.²⁴⁵ Additionally, AFBF contends that the inclusion of NPS-impaired waters in the TMDL process would violate § 101(b) of the Act, which proclaimed "the policy of the Congress to recognize, preserve, and protect the

238. *Id.* at 13.

239. *See* Reply Brief of Plaintiffs-Appellants at 13, *Pronsolino v. Marcus* (9th Cir. filed Jan. 11, 2001) (No. 00-16026, No. 00-16027) ("At a minimum, the enactment of section 319 shows that the 1987 Congress did not share EPA's current view that section 303(d)(1) TMDLs were an available tool for fighting NPS pollution, a conclusion confirmed by the lack of any mention of TMDLs in the legislative history of section 319.")

240. Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 39.

241. *See id.* at 39-48 (discussing EPA's inconsistent administrative history).

242. Reply Brief of Plaintiffs-Appellants, *supra* note 239, at 18. AFBF believes that the EPA's new position is unreasonable and is not entitled to deference because it does not comport with the Congress's clear intention that § 303(d)(1) applies only to waters subject to point source pollution. Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 48 n.9.

243. *See* Opening Brief of Plaintiffs-Appellants, *supra* note 228, at 54 (arguing that it is only logical to apply TMDLs to waters affected by point source pollution because of problems quantifying runoff).

244. *See id.* at 55 (stating that Congress intended to use "separate tools to address different problems").

245. *Id.*

primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.²⁴⁶ In support of this argument, AFBF argues that the EPA's inclusion of NPS pollution in TMDLs amounts to the unconstitutional federal regulation of state land use decisions.²⁴⁷ "At a minimum, the EPA plays the role of TMDL super-regulator, overseeing the states' land use controls. But the Constitution does not permit the federal government to 'regulate state governments' regulation' of local land uses, as the EPA seeks to do."²⁴⁸ Thus, by characterizing the EPA as a "super-regulator," AFBF creates a second avenue of attack in the event its primary argument for a "plain meaning" approach to statutory construction is unsuccessful.

b. EPA's Argument for Inclusion

Like AFBF, the EPA also urges the Ninth Circuit to adopt an interpretation of § 303(d)(1) based on the plain language of the statute.²⁴⁹ However, the EPA argues that such an interpretation requires the "listing of, and establishment of TMDLs for, all waters that cannot be brought into conformity with applicable WQS through the use of technology-based effluent limitations – whether the pollutant in the substandard waters comes from point sources, NPS, or a combination of the two."²⁵⁰ Thus, the EPA contends that § 303(d)(1) need not explicitly include NPS-impaired waters in the TMDL process because the provision clearly mandates TMDLs for "any water" that fails to meet WQS.²⁵¹ The EPA believes that Congress's explicit reference to effluent limitations in § 303(d)(1)(A) merely suggests that technological standards are

246. 33 U.S.C. § 1251(b) (1994).

247. Reply Brief of Plaintiffs-Appellants, *supra* note 239, at 22-23 (quoting *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001)). In making this states' rights argument, AFBF cited *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001), a recent Supreme Court decision in which the Court scaled back federal authority over isolated wetlands under § 404 of the CWA. *Id.* at 22. "As the Supreme Court recently held, courts must reject an agency's statutory interpretation that 'alters the federal-state framework by permitting federal encroachment upon a traditional state power' without a 'clear indication that Congress intended that result.'" *Id.* (quoting *SWANCC*, 531 U.S. at 172). Interestingly, this "is the first time the *SWANCC* decision has been cited as precedent and the court's response will provide observers with their first glimpse of how far federal courts may be willing to go in interpreting the decision." *Farm Bureau Tests Limits of Supreme Court Wetlands Ruling*, *INSIDE EPA*, Feb. 2, 2001, at 5.

248. Reply Brief of Plaintiffs-Appellants, *supra* note 239, at 23 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

249. Brief of the Federal Appellees at 27, *Pronsolino v. Marcus* (9th Cir. 2000) (No. 00-16026, No. 00-16027) (on file with author).

250. *Id.*

251. *Id.* at 32.

to be used as a primary method of pollution control and was not meant to limit the category of waters for which TMDLs are required.²⁵²

The EPA provides two main arguments to buttress its interpretation that § 303(d)(1)(a) TMDLs include waters impaired solely by NPS pollution. First, the EPA asserts that Congress's placement of the TMDL program in the water quality-based approach of § 303 demonstrates congressional intent that TMDLs include both point and nonpoint sources.²⁵³ Second, the EPA argues that its statutory interpretation comports with Congress's overall purpose in enacting the TMDL program: ensuring that TMDLs are set "at a level necessary to implement the applicable WQS."²⁵⁴ In making this argument, the EPA posits that because all waters are subject to WQS and because WQS will not be met in a large percentage of waterbodies if TMDLs do not include NPS pollution, then Congress necessarily intended for TMDLs to include NPS-impaired waters.²⁵⁵

In addition to its primary argument that the CWA clearly provides authority to include NPS-impaired waters in the TMDL process, the EPA also argues that even if the statute is ambiguous, its construction of the statute meets the standard of reasonableness established by *Chevron v. Natural Resources Defense Council*.²⁵⁶ In making this argument, the EPA asserts that its consis-

252. See *id.* at 33 (stating that Congress intended "effluent limitations" to be a "first line of defense against substandard water quality").

253. See *id.* (discussing structure of CWA and water quality-based standards of § 303). "Under the water quality-based approach, EPA and the States 'work backward from an over-polluted body of water and determine which entities were responsible.' As a component of the water-quality based approach, the TMDL process must account for both point and nonpoint sources of pollution." *Id.* at 33-34 (quoting *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (internal citation omitted)).

254. *Id.* at 35 (quoting 33 U.S.C. § 1313(d)(1) (1994)).

255. See *id.* at 37 ("As a leading commentator on the CWA has put it, if NPS were not included, a process to ensure that municipal and industrial limits were 'consistent with water quality standards' would make no sense; it, literally, could not be done." (quoting Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,329, 10,337 n.100 (July 1997)).

256. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court considered whether the EPA exceeded its statutory authority under the Clean Air Act (CAA) by promulgating a definition of the statutory term "stationary source" that permitted states to treat all of the pollution-emitting devices within the same industrial groupings as though they were encased within a single bubble. *Chevron*, 467 U.S. at 840-66. In upholding the EPA's interpretation of the statutory term, the Court established a two-step test for determining whether an agency's interpretation of a statute is reasonable. *Id.* at 842-43. First, a court is to determine "whether Congress has directly spoken to the precise question at issue in the statute. If the intent of Congress is clear, that is the end of the matter . . ." *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In applying this two-part test, the Court found that while the legislative

tent interpretation of the statute to include NPS pollution, as well as the legislative history of § 303(d), entitles its construction to deference under step two of the *Chevron* framework.²⁵⁷ With regard to its burden of persuasion, the EPA notes that "[u]nder *Chevron*, it is not necessary for EPA to demonstrate that a competing interpretation of the CWA urged by other parties is inconsistent with the statutory text or unreasonable, but only that the agency's own reading is 'reasonable' and not 'clearly contrary to the intent of Congress.'"²⁵⁸ Because the EPA is likely to prevail under such a deferential *Chevron* step two analysis, it is not surprising that AFBF has not acknowledged the applicability of this standard to the EPA's interpretation of the statute.²⁵⁹

c. Predicting the Outcome

As the above analysis indicates, both the EPA and the AFBF argue that the plain language of § 303(d)(1) supports their respective arguments for either inclusion or exclusion of NPS pollution from the mandatory TMDL process. After assessing these opposing arguments, the *Pronsolino* court summarily rejected the AFBF's interpretation of the statute based on its findings that § 303(d)(1) clearly conveys upon the EPA authority to include NPS-impaired waters in the TMDL process.²⁶⁰ By reaching its holding under step one of *Chevron*, the *Pronsolino* court emphatically pronounced the EPA's statutory right to include NPS-impaired waters in TMDLs.²⁶¹

While the *Pronsolino* court rendered its decision under step one of *Chevron*, subsequent courts easily could analyze the NPS issue under step two of *Chevron*. Courts could base such an analysis on a finding that § 303(d)(1) is unclear as to whether the TMDL process should include waters impaired solely by NPS pollution and that the central question is whether the EPA's interpretation of the statute is reasonable.²⁶² Noticeably present in the *Pronsolino*

history of the CAA was silent on the issue of statutory construction, it revealed that the EPA's interpretation was fully consistent with the purpose of the Act. *Id.* at 862-65. Accordingly, the Court held that EPA's interpretation of the statute was entitled to deference. *Id.* at 866.

257. See Brief of the Federal Appellees, *supra* note 249, at 39 (stating that EPA has given § 303(d) "the same reading, consistently, from the issuance of the first regulations" (citation omitted)).

258. *Id.* at 40 (quoting *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1525 (9th Cir. 1995)).

259. See *id.* at 39 (stating that appellants failed to acknowledge application of *Chevron* standard to case); *Chevron*, 467 U.S. at 863-64 (finding that various interpretations by EPA of word "source" in Clean Air Act were not unreasonable and did not strip agency of deference).

260. See *supra* notes 211-31 and accompanying text (analyzing *Pronsolino*).

261. See *supra* notes 215-16 and accompanying text (discussing *Pronsolino* Court's holding as *Chevron* step one decision).

262. See *supra* note 256 and accompanying text (discussing *Chevron* framework for determining reasonableness of agency decision-making).

opinion is substantial dicta discussing Ninth Circuit case law, the legislative history of § 303(d), and the role of § 319 in the CWA statutory scheme.²⁶³ As discussed above, similar analyses of these aids and interpretations of statutory construction appear in the briefs submitted by the EPA and the AFBF to the Ninth Circuit.²⁶⁴ Thus, the fact that the *Pronsolino* court, the AFBF, and the EPA have found it necessary to spend considerable time analyzing "supplemental aids of construction," as well as the fact that on its face § 303(d) says nothing about whether nonpoint sources are "in or out," suggests that subsequent courts might decide the NPS issue under step two of *Chevron*.²⁶⁵

A *Chevron* step two analysis would differ only in form, however, from the district court holding in *Pronsolino v. Marcus*. Because the EPA is the federal agency that is statutorily responsible for administering § 303(d) of the CWA, courts are likely to accord substantial deference to its interpretation of this provision.²⁶⁶ Therefore, because the EPA will likely prevail under a *Chevron* step two analysis, AFBF's only real hope for a reversal of *Pronsolino* in the Ninth Circuit, or the destruction of the Final TMDL Rule in the D.C. Circuit, is a holding that § 303(d) clearly limits the EPA's authority to include NPS pollution in TMDLs. Based on the arguments analyzed above, such a holding is unlikely. Quite simply, neither the AFBF nor the EPA can point to any substantive language in the statute or the legislative history that dispositively answers the NPS question.²⁶⁷ For this reason, the EPA's interpretation

263. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1347-56 (N.D. Cal. 2000).

264. See *supra* notes 232-59 and accompanying text (analyzing arguments of EPA and AFBF).

265. See *Pronsolino*, 91 F. Supp. 2d at 1347 n.12 (finding "no need to resort to supplemental aids of construction"); HOUCK, *supra* note 14, at 62 ("In enacting § 303(d), Congress, at best, said nothing about whether nonpoint sources were in or out, and would have had to have been insane to, on the one hand, spell out the TMDL process, and on the other, exclude those nonpoint sources it recognized at the time were so much the cause of the problem."). This lack of clarity, as well as a lack of political will, discussed *supra* at note 66, explains why § 303(d) has languished as a potential tool for addressing NPS pollution.

266. See *Chevron v. National Res. Def. Council*, 467 U.S. 837, 863 (1984) (stating that EPA interpretation of CAA deserves deference). In *Chevron*, Justice Stevens makes the following statement that is directly applicable to the *Pronsolino* appeal and the TMDL litigation:

The fact that the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Id. at 863-64.

267. See HOUCK, *supra* note 14, at 62 (stating that CWA and its legislative history is unclear on NPS issue).

that it possesses the statutory authority to include waters impaired solely by NPS pollution in the TMDL program is likely to be upheld.²⁶⁸

B. Analyzing the Policy: The Time Is Now for TMDLs

The *Pronsolino* decision was an important victory for the EPA in its fight to promulgate and implement the Final Rule. Only days after the *Pronsolino* decision, the EPA and the Department of Justice (DOJ) issued a press release to publicize this "landmark clean water decision."²⁶⁹ While providing tremendous legal support for the EPA's interpretation of the TMDL program, the *Pronsolino* decision alone is not sufficient to ensure the survival of the Final Rule and the ultimate success of the TMDL program. Even assuming that the Ninth and D.C. Circuits will uphold the EPA's authority to include NPS-impaired waters in TMDLs, a number of tough policy decisions remain to be made to reign in NPS pollution and to secure significant improvements in our nation's water quality.

1. Tough Choices and TMDLs

Professor Oliver Houck stated that "unless TMDLs include quantified restrictions on nonpoint sources, they are worth no one's time."²⁷⁰ Considering the fact that a large proportion of substandard waters will not meet WQS unless their TMDLs address NPS pollution, Houck's statement rings true.²⁷¹ However, even assuming NPS pollution is included in the process, TMDLs

268. Due to the critical importance of the NPS pollution issue, *Pronsolino v. Marcus* is likely to reach the Supreme Court. See Adam Krantz, *High Court Poised to Scale Back Key Environmental Protections*, INSIDE EPA, Feb. 23, 2001, at 17 (stating that Supreme Court is likely to choose to review Ninth Circuit's holding in *Pronsolino*). One commentator reported the following:

[T]he issue of whether the Clean Water Act allows EPA to regulate nonpoint source pollution will be an issue put before the Supreme Court and that the issue is of such vital importance to a host of industrial and environmental interests that the Court may choose to review it. Furthermore, as litigation is brought on this issue in a number of state and federal jurisdictions, as is presently occurring, the likelihood of a jurisdictional split in authority grows more likely, increasing the likelihood of Supreme Court involvement. Some lawyers even say the issue is of such critical magnitude . . . that the high court may review the 9th Circuit's decision in order to block such a split from occurring in the first place.

Id.

269. See U.S. EPA, *Federal Court Issues Landmark Clean Water Decision*, available at <http://www.epa.gov/owow/tmdl/pronsdecision.html> (last visited Feb. 4, 2002) ("The court has affirmed a strong tool for restoring America's rivers and cleaning up pollution, regardless of its source.").

270. HOUCK, *supra* note 14, at 63.

271. Brief of the Federal Appellees, *supra* note 249, at 36.

are also "worth no one's time" unless the states and the federal government make significant commitments to the TMDL program. First and foremost, once TMDLs are established, state and local governments must be willing to make tough, often political, decisions concerning allocation of abatement loads among point and nonpoint source polluters.²⁷² Although the CWA requires these decisions to remain in the hands of state and local governments, the EPA can provide incentives, assistance, and oversight to enrich the quality of these decisions.²⁷³ As previously discussed, the implementation plans, "reasonable assurance" requirements, and scheduling provisions of the Final TMDL Rule empower states with the necessary tools to ensure that the TMDL process actually will result in the attainment and preservation of WQS.²⁷⁴ Admittedly, the states are not thrilled at having the tools with which to make such difficult policy decisions.²⁷⁵ Nevertheless, after over thirty years of inaction, the time has come for states to accept their statutory responsibilities under the CWA and make these tough decisions. The good news is that the states are not alone. The Final Rule provides states with the necessary guidance to ensure that TMDLs actually will achieve improvements in water quality and are really worth the financial and political commitments that must be made to reign in the NPS industries.²⁷⁶

Second, the TMDL program cannot achieve its intended results without sufficient funding and support from Congress. Unfortunately, the initial reaction from Congress concerning the Final Rule has not been positive. Congress

272. See U.S. EPA, *Final TMDL Rule: Fulfilling the Goals of the Clean Water Act*, available at <http://www.epa.gov/owow/tmdl/finalrule/factsheet1.html> (last visited Mar. 3, 2001) (stating that states have "maximum flexibility to make their own choices about which sources of pollution to clean up").

273. See *United States v. New York*, 505 U.S. 144, 147 (1992) (stating that Congress may attach conditions on receipt of federal funds).

274. See *supra* notes 119-87 (discussing key provisions of Final Rule).

275. See *Water Pollution: Supplemental Spending Bill Approved By Congress Stops TMDL Rulemaking Effort*, Chem. Reg. Daily (BNA) (July 3, 2000), available at WL 7/3/2000 CHR D2 (discussing concerns of Association of State and Interstate Water Pollution Control Administrators with Final Rule).

276. See U.S. EPA, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)*, Memorandum from Robert Perciasepe, Assistant Administrator for Water, U.S. EPA, to Regional Administrators and Regional Water Division Administrators, U.S. EPA (Aug. 8, 1997), available at <http://www.epa.gov/owow/tmdl/ratepace.html> (last visited Feb. 2, 2002) [hereinafter Perciasepe Memorandum] (discussing importance of implementing TMDLs). Robert Perciasepe, former Assistant Administrator for Water of the EPA, stated that "a TMDL improves water quality when the pollutant allocations are implemented, not when a TMDL is established." *Id.* It is not surprising, therefore, that the EPA believes that implementation of TMDLs is the most important aspect of the Final TMDL Rule. See Final TMDL Rule, 65 Fed. Reg. 43,586, 43,625 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130) ("EPA believes that implementation of TMDLs is the most important aspect of today's rule. Without implementation, TMDLs are merely paper plans to attain water quality standards.").

passed legislation that prevents funding for the Final TMDL Rule until fiscal year 2002.²⁷⁷ In the meantime, Congress has directed the EPA and a National Research Council (NRC) committee to undertake a scientific assessment of the costs and benefits of the TMDL program.²⁷⁸ The NRC study has the potential to provide useful scientific information on how to establish effectively TMDLs with respect to NPS pollution.²⁷⁹ However, the study should not be used to second-guess policies already adopted by the EPA in the Final Rule.²⁸⁰ Finally, some members of Congress have threatened to exercise their power under the congressional review provisions of the Contract With America Advancement Act to kill the Final TMDL Rule.²⁸¹ Such action would render trivial the *American Farm Bureau* litigation, virtually erase over four years of work by stakeholders and the EPA, and leave the states without any significant guidance for the establishment of TMDLs.²⁸²

Notwithstanding these setbacks, there are positive signs for the TMDL program on the political horizon. While Congress specifically prevented the Final Rule from receiving funding for fiscal year 2001, it increased general federal funding for state clean water programs by \$55 million in its fiscal year 2001 appropriations.²⁸³ Additionally, reports are already surfacing that water

277. See *supra* note 20 and accompanying text (discussing appropriations rider).

278. See Notice of Request for Comments on State, Regulated Community, and Small Business Cost Resulting From TMDL Program, 65 Fed. Reg. 75,699, 75,700 (Dec. 4, 2000) (seeking comments on Final Rule).

279. See *Water Pollution: Scientists, Hill Staff Differ Over Charge of Science Panel Examining the TMDL Program*, Daily Env't Rep. (BNA) (Jan. 25, 2001), available at WL 17 DEN A-13, 2001 (discussing meeting of National Research Council committee).

280. See *id.* (discussing potential issues of scientific uncertainty in TMDLs). Nina Bell, executive director of Northwest Environmental Advocates, believes that scientific uncertainty should not sidetrack the TMDL program: "Scientific uncertainty is found throughout the water quality-based approach in the act, not just TMDLs To attack the TMDL program because of uncertainty is to attack the whole water-quality based approach." *Id.*

281. See *Republican Administration, Congress Seen Increasing Chances of Rule Reviews*, Daily Env't Rep. (BNA) (Jan. 12, 2001), available at WL 09 DEN AA-1, 2001 (discussing likelihood of Congress exercising power under Congressional Review Act, P.L. 104-221). "Under the review provisions, Congress can agree through joint resolution passed by simple majority to overturn a rule." *Id.*

282. Congressional review of the Final Rule is highly unlikely. *Id.* This power has never been exercised by Congress for fear of the political fallout that would result from such action. *Id.* Being a highly visible regulation, the Final Rule does not appear to be a good candidate for a first-time test of this power. See *id.* (stating that since Congressional Review Act was passed, seven joint resolutions have been introduced but none has passed); *Clean Water Act: EPA Proposal to Control CAFO Pollution, Infrastructure Financing Seen as Key Issues*, Daily Env't Rep. (BNA) (Jan. 23, 2001), available at WL 15 DEN S-16, 2001 (stating "that with Bush's environmental reputation on the line, that [congressional review of the Final Rule] may not be a prudent move").

283. See *Water Pollution: Full Funding for State Water Programs Released by EPA, But May Have Conditions*, Daily Env't Rep. (BNA) (Jan. 31, 2001), available at WL 21 DEN A-5,

infrastructure funding, including funding for NPS programs, is a top priority for the 107th Congress.²⁸⁴ A strong congressional commitment to funding state clean water programs would go a long way toward alleviating the fears of states that are committed to developing and implementing TMDLs, but are hesitant to do so for fear of straining state budgets.²⁸⁵

2. TMDL Policy and the Bush Administration

While the support of the states and Congress is essential to the success of the TMDL program, the ultimate decision on the future of TMDLs rests with President Bush and his administration. For any other environmental regulation passed by a preceding administration, an incoming President easily could announce a change in policy to reflect the political ideology of his party.²⁸⁶ Fortunately, the Final TMDL Rule is different: the water-quality standards of TMDLs are consistent with President Bush's conservative political ideology.²⁸⁷ President Bush articulated a set of environmental principles to guide the EPA under his administration that include increasing the role of states in environmental decision-making, improving the efficiency of federal environmental programs, and using scientific analysis to inform policy decisions.²⁸⁸ Ironically, each of these principles is consistent with the TMDL program as set forth in the Final TMDL Rule.

First, TMDLs respect state primacy in environmental regulation. Section 303(d) was included in the CWA at the insistence of the states, who retain complete authority to make decisions concerning the regulation of point and nonpoint source polluters.²⁸⁹ Second, TMDLs are economically efficient.

2001 (stating that Congress approved \$170 million in § 106 funding under CWA in its fiscal year 2001 appropriation to EPA as compared to \$115 million in fiscal year 2000); see also *supra* note 20 and accompanying text (discussing appropriations rider).

284. See *Water Infrastructure Funding Hearings Will Commence In Spring*, INSIDE EPA, Jan. 12, 2001, at 7 (stating that Bob Smith (R-NH), co-chairman of powerful Senate Environment & Public Works Committee, believes water infrastructure funding is "one of the top five environmental priorities" this year for his committee).

285. See National Wildlife Federation, *TMDL Factsheet: Saving Our Watersheds*, available at <http://www.nwf.org/watersheds/fact.html> (last visited Feb. 4, 2002) ("For states to aggressively use the Clean Water Act's TMDL provision, Congress must provide adequate funding for state agencies.").

286. Obviously, such a change would entail abiding by the rulemaking procedures of the Administrative Procedure Act.

287. See *supra* notes 38-41 and accompanying text (discussing President Bush's views on environmental regulation).

288. See *Whitman Testimony*, *supra* note 2 (discussing President Bush's environmental principles).

289. See *supra* notes 88-95 and accompanying text (discussing legislative history of § 303(d)).

While the initial costs of obtaining the science necessary for TMDLs are high, the BMPs capable of reducing NPS pollution are not.²⁹⁰ Thus, once states get past the first stage of establishing TMDLs, the TMDL program is cheaper and far more productive than a continued single-minded focus on reducing effluent limitations from point sources.²⁹¹ Also, consistent with President Bush's commitment to reducing litigation, the Final TMDL Rule's comprehensive guidance is likely to reduce substantially the litigation costs that continue to plague the TMDL program.²⁹² Finally, the TMDL program is grounded in science and provides a common-sense approach to addressing water pollution.²⁹³ Because scientists agree that NPS pollution causes the overwhelming majority of our nation's water problems, the provisions in the Final TMDL Rule addressing NPS pollution are consistent with the Bush administration's belief in policies based on "sound science."²⁹⁴

Thus, based purely on an analysis of political ideology, the TMDL program is a good representation of President Bush's environmental principles. However, as always, politics play a role. For President Bush to embrace TMDLs, he must alienate his political allies in the agricultural and silvicultural industries.²⁹⁵ Thus far into the Bush administration, the signs are unclear as to whether President Bush will pass this political litmus test. A positive sign for TMDLs is President Bush's \$7.3 billion budget request for the EPA in fiscal year 2002 that includes more than \$1 billion in grants to states to implement federal environmental programs.²⁹⁶ Although President Bush's

290. See *supra* note 28 and accompanying text (comparing costs for NPS reduction and point source reduction).

291. See *supra* note 28 and accompanying text (comparing costs for NPS reduction and point source reduction).

292. See *supra* note 40 and accompanying text (discussing President Bush's commitment to reducing litigation); Conway, *supra* note 5, at 120 (stating that "TMDL litigation itself has also resulted in a 'hidden' cost through its considerable drain on EPA resources").

293. See HOUCK, *supra* note 14, at 167 (discussing "logic" of TMDLs). Professor Houck offered the following analysis of TMDLs: "The logic is political. As imperfect as their assessments may be – and all environmental assessments are imperfect – TMDLs provide both a bottom line and their own reason to get there, a reason that everybody can understand: the creek is dirty, so clean it up." *Id.*

294. See *Water Group Urges Whitman to Focus on Runoff, Infrastructure*, INSIDE EPA, Jan. 26, 2001, at 2 (stating that water treatment industry group is optimistic that Bush EPA's commitment to science-based decisions will lead to policies addressing NPS pollution). "[W]hitman stressed that EPA will base its decisions on sound science and [] this was encouraging because scientists are united that the large majority of the nation's water problems stem from nonpoint source pollution." *Id.*

295. See *Agribusiness Political Contribution Data*, *supra* note 38 (finding that agribusinesses contributed over \$2,500,000 to President Bush's campaign).

296. See *A Blueprint for New Beginnings-31. Environmental Protection Agenda*, available at <http://www.whitehouse.gov/news/usbudget/blueprint/bud31.html> (last visited Feb. 4, 2002) (providing highlights of year 2002 funding).

overall EPA budget is \$500 million less than that enacted in fiscal year 2001, the proposal provides the highest level of funding for state programs in the EPA's history.²⁹⁷ As previously discussed, such an increase in state funds would benefit the TMDL program directly by providing much-needed federal support for states to move forward with TMDL development and implementation.²⁹⁸

Although President Bush's proposed increase in spending for state environmental programs provides hope for the TMDL program, it is a far cry from explicit support from the Bush administration for the Final TMDL Rule. Aside from a statement by the EPA Administrator, Christine Todd Whitman, that she will review the Final Rule, the Bush administration has yet to make any substantive comments on TMDLs.²⁹⁹ One commentator suggested that this silence indicates that the EPA is waiting for the D.C. Circuit's holding in *American Farm Bureau Federation v. EPA* to come down before taking a public stance on the issue.³⁰⁰ While this is not surprising, given the political stakes at play, this "wait and see" approach with TMDLs is terribly inadequate. If Administrator Whitman is serious about statements she made in her Senate confirmation testimony that she will focus on reducing NPS pollution, and President Bush is committed to supporting policies that reflect his environmental principles, the Bush EPA cannot remain silent on TMDLs.³⁰¹

V. Conclusion

For over thirty years, the EPA focused almost exclusively on controlling discharges from point sources under the NPDES program found in § 402 of the CWA.³⁰² Although this approach has greatly improved the quality of our water resources, over 40% of our nation's waters still do not meet applicable WQS due to impairment from NPS pollution.³⁰³ Although initially seen as a mere back-up plan for technology-based effluent limitations, the overwhelm-

297. *Id.*

298. See *supra* note 285 and accompanying text (discussing need for federal support of TMDL program).

299. See EPA: *Whitman Promises Cleaner Environment, Says New Clinton Rules Would Be Reviewed*, Chem. Reg. Daily (BNA) (Jan. 18, 2001), available at WL 1/18/2001 CHR D2 (discussing Whitman's plans for EPA).

300. See *Clean Water Act: EPA Proposal to Control CAFO Pollution, Infrastructure Financing Seen as Key Issues*, Daily Env't Rep. (BNA) (Jan. 23, 2001), available at WL 15 DEN S-16, 2001 (discussing future of TMDLs).

301. See *Water Group Urges Whitman to Focus on Runoff, Infrastructure*, INSIDE EPA (Jan. 16, 2001) at 2 (stating that Whitman acknowledged in her Senate testimony that NPS pollution was primary concern).

302. See *supra* notes 55-65 and accompanying text (discussing regulatory history of CWA).

303. See *supra* notes 4-6 and accompanying text (discussing extent of NPS pollution).

ing impact of NPS pollution on our nation's waters has caused TMDLs to become a key issue in national environmental policy.³⁰⁴ Due to the ineffectiveness of the voluntary programs found in § 208 and § 319 to address NPS pollution, concerned citizens have turned to the TMDL program of § 303(d) for results.³⁰⁵

As a response to numerous lawsuits brought by these citizen groups, the EPA undertook a rulemaking process to give direction to the TMDL program.³⁰⁶ Encouraged by the decision in *Pronsolino v. Marcus*, the EPA published the Final TMDL Rule to assist states in fulfilling their statutory duties under § 303(d).³⁰⁷ For the first time in CWA history, the implementation plans, "reasonable assurance" requirements, and scheduling provisions found in the Final Rule provide the states with the ability to achieve significant reductions in NPS pollution.³⁰⁸ For this reason, the NPS industries are viciously opposed to the Final Rule. These industries successfully lobbied for an appropriations rider that delayed implementation of the Final Rule and are currently attacking the Rule in the D.C. Circuit.³⁰⁹ As a result, the fate of the Final TMDL Rule hangs in the balance.

Enter the Bush Administration and its commitment to "compassionate conservatism."³¹⁰ In winning the Presidency, George W. Bush unknowingly inherited the most challenging environmental policy decision of his political life. The question remains, however, whether President Bush will choose to embrace a TMDL program that is consistent with his conservative political ideology or will choose to protect the NPS industries from inclusion in the TMDL process. The stakes are high, but the proper decision is clear: by supporting the TMDL program, President Bush will affirm his environmental principles and – more importantly – take a bold step toward addressing our nation's last remaining source of unchecked water pollution.

304. *Id.*

305. *See supra* notes 70-87 and accompanying text (discussing failure of §§ 208 and 319 to reduce NPS pollution).

306. *See supra* note 13 and accompanying text (discussing TMDL litigation).

307. *See supra* notes 211-31 and accompanying text (discussing *Pronsolino v. Marcus*).

308. *See supra* notes 119-87 (discussing key provisions in Final Rule).

309. *See supra* notes 23-25, 207-08, and accompanying text (discussing *American Farm Bureau* litigation).

310. *See* Biography of George W. Bush, available at <http://www.whitehouse.gov/president/gwbbio.html> (last visited Feb. 4, 2001) (stating that "President Bush has earned a reputation as a compassionate conservative who shapes policy based on the principles of limited government, personal responsibility, strong families and local control").