

IMPAIRED WATERS & PERMITTING

IMPLICATIONS OF PINTO CREEK DECISION

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Pinto Creek

Ninth Circuit Decision

Uncertainty

CWA Structure

“Point Source”

Water Quality Report

Nonpoint Challenge

303(d) Lists

Introduction

On the surface, the Ninth Circuit Court of Appeals’ (Ninth Circuit) recent opinion in *Friends of Pinto Creek v. U.S. Envtl. Protection Agency (Pinto Creek)* does not appear to represent much of significance. The decision is relatively short, and spends much of its analysis on the interpretation of one federal regulation — 40 C.F.R. § 122.4(i). Nor does the opinion go to great lengths to address public policy balancing, Congressional intent or conflicting precedent. Yet, the holding of *Pinto Creek* is significant, and despite legitimate questions about the soundness of its legal reasoning, the decision will likely have widespread ramifications throughout the western United States.

This article will identify where uncertainty now lies in the NPDES permitting process after *Pinto Creek*, and, where applicable, suggest mechanisms that potential permittees (or policymakers) can utilize to distinguish or minimize the restrictive effect of the *Pinto Creek* decision.

Regulatory Context

Understanding the *Pinto Creek* decision and its implications requires a basic familiarity with the federal Clean Water Act (CWA) and its structure. The stated purpose of CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In many ways, the CWA has been a great success story. The CWA’s National Pollutant Discharge Elimination System (NPDES) permit program has removed the most concentrated sources of pollutant loading by requiring municipal and industrial “point sources” of water pollution to treat their waste streams with specified pollutant removal technologies prior to discharge. See 40 C.F.R. § 122.44(a)(1).

Section 402 of the federal Clean Water Act (CWA) precludes discharge of pollutants from a “point source” to jurisdictional waters of the US unless an NPDES permit is first obtained. 40 C.F.R. § 122.1(b). CWA defines a point source as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362.

Water quality in many watersheds improved substantially with the implementation of the NPDES program. Yet, in its 2002 CWA Section 305(b) report to Congress detailing the condition of the Nation’s waters, the US Environmental Protection Agency (EPA) reported that approximately 45 percent of rivers/streams and 47 percent of lakes/reservoirs do not support their designated beneficial uses (such as fishing and swimming). See EPA, *National Water Quality Inventory: Report to Congress, 2002 Reporting Cycle*, at ES-2 (October 2007) (hereinafter 2002 Section 305(b) Report).

The statistics in the 2002 Section 305(b) Report reveal what is perhaps CWA’s greatest continuing challenge — controlling nonpoint sources (NPS) of water pollution. NPS is “pollution that does not result from the ‘discharge’ or ‘addition’ of a pollutant” from a “point source.” *Or: Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987). NPS is typically associated with runoff from agricultural or silvicultural operations, but can encompass other activities that degrade water quality including water withdrawals and hydromodification of stream channels. See generally *Id.* at 849. NPS water pollution alone is often sufficient to prevent attainment of designated beneficial uses in many watersheds. See for example, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), which noted that impairment of the Garcia River was entirely attributable to NPS pollution.

Where beneficial uses are not supported by existing water conditions (even after the implementation of technology based effluent limitations in NPDES permits), the CWA outlines mandatory steps to address remaining problems. CWA Section 303(d), 33 U.S.C. § 1313(d), requires each state — every two years — to compile a list of all waters within its boundaries that are not anticipated to attain water quality standards. 40 C.F.R. § 130.7(d)(1). This “303(d) list” is submitted to EPA. The next step in the process is for the state, upon consultation with EPA and internal prioritization of efforts, to develop a total daily maximum loads (TMDLs) for the impaired waterbodies. 33 U.S.C. § 1313(d)(1)(C). A TMDL is a regulatory determination regarding the sum of pollutants (the “load”) a body of water can absorb from all point and nonpoint sources, plus a margin of safety, while still meeting water quality standards. 40 C.F.R. § 130.2 (i). In other words, TMDLs are “the best possible estimates of the assimilative capacity of [a] water body for a pollutant

**Pinto Creek**

**“New”  
Discharge  
Preclusion**

under consideration.” *City of Waco v. Tex. Natural Res. Conservation Comm’n*, 83 S.W.3d 169 (Tex. Ct. App. 2002). TMDLs set up an “allocation” framework to limit an impaired waterbody’s total pollutant load to within its assimilative capacity.

*Pinto Creek* holds that EPA rules for NPDES permit issuance at 40 C.F.R. § 122.4(i) preclude issuance of a “new” discharge permit for any waterbody listed as “impaired” on a 303(d) list until: 1) all existing “discharges” from “point sources” in the watershed are identified and made subject to compliance schedules; and 2) the compliance schedules can demonstrate future attainment of all pertinent water quality standards. By vacating EPA’s Appeals Board decision in *In re Carlota Copper Co.*, 11 Env’tl. Admin. Decisions 692 (Sept. 30, 2004), the Ninth Circuit has injected uncertainty into virtually any project or development that will require issuance of a “new” NPDES permit in the western US.

Although *Pinto Creek* is a case about an NPDES permit issued by EPA in Arizona (Arizona had not yet received EPA delegation to administer a state NPDES program at the time of permit issuance), most of EPA’s rules implementing the NPDES program in 40 C.F.R. Part 122 — including those implicated in *Pinto Creek* (e.g., 40 C.F.R. § 122.4 and 40 C.F.R. § 122.44(d)) — apply with equal force to state-administered NPDES programs. See 40 C.F.R. § 123.25; compare 33 U.S.C. 1342(a)(3) (EPA’s permit program is subject to the “same terms, conditions, and requirements” as a state permit program).

**Pinto Creek Background**

Pinto Creek is a desert river in Central Arizona about 60 miles east of Phoenix. It is dry for much of the year, but there are stretches that flow perennially in small volumes as the result of groundwater contributions. Pinto Creek is currently listed as impaired for copper and in 2001 EPA developed a TMDL for the water quality limited segment in the vicinity of the proposed Carlota Copper Mine (Carlota). Subsequent investigation and sampling by the state of Arizona Department of Environmental Quality (ADEQ) revealed that Pinto Creek and its tributaries, in their natural state, contain high levels of naturally occurring copper (approximately four times greater than the default levels established in the TMDL). ADEQ’s investigations also revealed that approximately 90% of the copper loading in the upper portion of the watershed could be attributed to leaching and runoff in and around the abandoned Gibson Mine. See ADEQ, *Pinto Creek Site Specific Water Quality Standard for Dissolved Copper* (Draft) 31 (March 12, 2007) (available at [www.azdeq.gov/environ/water/assessment/download/pinto\\_final.pdf](http://www.azdeq.gov/environ/water/assessment/download/pinto_final.pdf)). As a result of the findings regarding natural background conditions, and the desire to clean up the watershed while allowing ecologically responsible mining activities to continue, the State of Arizona is currently completing development of a site-specific water quality standard for copper in Pinto Creek. *Id.* at 1-4.

In the late 1990s, Carlota proposed to construct and operate a 3000-acre open-pit copper mine and processing facility on Pinto Creek with the intention of extracting approximately 100 million tons of ore over the life of the mine. The proposed project consisted of: four open pits; a sulfuric acid heap leach pad; process solution ponds; an on-site processing plant; waste rock disposal areas; and other facilities. The mine pits were designed to drain internally, thereby preventing discharges during active mining operations. Pinto Creek was to be diverted around the mine through two diversion channels. However, stormwater channelized within the mine and exposed to materials containing high concentrations of copper would be “discharged” to Pinto Creek via outlet structures during large storm events — thereby triggering the need to obtain a NPDES permit.

EPA, the permitting authority at the time, granted Carlota’s permit application in July 2000 after receiving certification from the State of Arizona, in accordance with Section 401 of CWA (33 U.S.C. 1341), that the discharge would not violate state water quality standards. As a condition of the permit, Carlota was required to conduct mitigation in and around the Gibson Mine to “offset” any additional loadings of copper to Pinto Creek that might result from construction and operation of the Carlota Mine. As a result of the mitigation, Pinto Creek would be cleaner after implementation of the new permit than before. Nevertheless, Friends of Pinto Creek, and other non-governmental organizations, (hereinafter “Plaintiffs”) filed a petition challenging the issuance of the permit with the EPA Environmental Appeals Board (EAB) shortly thereafter. As a result of the challenge, and in response to public comments, EPA developed and approved a TMDL for Pinto Creek in 2001.

The TMDL included an allocation for Carlota’s proposed stormwater outfalls — notwithstanding the fact that the creek remained in violation of state water quality standards for copper. Plaintiffs amended their challenge to include an argument that no new discharges could be undertaken until all state water quality standards for Pinto Creek were met or exceeded (an impossibility because of naturally high background levels of copper in the watershed). Plaintiffs argued their petition before EAB in October of 2002. In September of 2004, EAB denied relief, and EPA Region IX issued a final NPDES permit to Carlota. Plaintiffs then appealed EAB’s decision to the Ninth Circuit. In October of 2007, the Ninth

**Intermittent  
Flow**

**Copper  
Loading**

**Mine Proposed**

**NPDES Permit**

**Mitigation  
Commitment**

**Discharge  
Allocation**

**Pinto Creek**

Circuit ruled in Plaintiffs' favor holding that no "new" permits could be issued until all point sources in water quality impaired segments of Pinto Creek were made subject to compliance schedules that would demonstrate compliance with all water quality standards. *Pinto Creek*, 2007 U.S. App. LEXIS 23251 at \*12-18.

**Analysis of the Pinto Creek Decision**

**Application of the CWA in Pinto Creek**

The Ninth Circuit in *Pinto Creek* correctly notes that new discharges that "cause or contribute" to a "violation of water quality standards" are prohibited under the CWA. 40 C.F.R. § 122.4(i). Likewise, NPDES permits issued in an impaired watershed must be consistent with any load allocations established in a TMDL (see 40 C.F.R. § 122.44(d)(1)(vii)(B), which provides that effluent limits developed to protect water quality criteria must be consistent with the assumptions and requirements of TMDL wasteload allocation). However, neither CWA nor EPA's regulations interpreting it, contemplate an outright ban on permitting of new point sources discharges where the overall impact of the new discharge will be a net benefit to water quality (the scenario in *Pinto Creek*).

For example, the court in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) rejected a ban on new discharges that would result in technical violation of the downstream state's water quality standards. The court noted that new discharges that improve overall water quality — through increased water volume or enhanced technology implementation — should be encouraged where EPA deems the discharge to be beneficial. This decision approved an administrative law judge's finding that downstream water quality standards were not violated — notwithstanding their 303(d) listing — where evidence suggested no "measurable" adverse impact on water quality. Similarly, the court in *Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502 (Minn. 2007) ("*Cities of Annandale*") construed 40 C.F.R. § 122.4(i) to authorize a "new" discharge permit where mandatory offsets would result in an overall reduction in loading to an impaired watershed.

Admittedly, the meaning of 40 C.F.R. § 122.4 (i) is ambiguous. See *City of Waco*, 83 S.W.3d at 176-77 (noting two divergent meanings attributed by the parties to the language of 40 C.F.R. § 122.4 (i)); and *Cities of Annandale*, 731 N.W.2d at 522 (concluding that 40 C.F.R. 122.4(i) is "unclear and susceptible to different reasonable interpretations.").

The Ninth Circuit in *Pinto Creek* appears to equate a new discharge in 303(d) listed waters with a per se violation of water quality standards. There is no support for this position in CWA. *Pinto Creek* only avoids a direct conflict with the Supreme Court's decision in *Arkansas v. Oklahoma* — which disapproved a comprehensive ban on new permits in impaired watersheds — by providing a narrow exception that could, under limited circumstances authorize EPA (or a state) to issue a NPDES permit to a "new source" or "new discharger" in an impaired water quality segment. See *Pinto Creek*, 2007 U.S. App. LEXIS 23251 at \*13-16. According to the Ninth Circuit, 40 C.F.R. § 122.4(i) does allow for a "new discharge" where load allocations are available, provided there is a compliance schedule in place for *existing point source dischargers* (whether formally permitted, exempt or illegal) in the impaired water quality segment, and the compliance schedule projects attainment of applicable water quality standards over time. *Id.* at \*12-17.

The court indicated on pages \*12-13 that EPA must include "any" point sources in a compliance schedule prior to permit issuance. Later in the decision, however, the court seems to imply that less than the total number of existing dischargers could be included in an EPA compliance schedule provided permit requirements for the subset will result in achievement of water quality standards. "If point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then the EPA must locate any such point sources and establish compliance schedules to meet the water quality standard before issuing a permit." *Id.* at \*18. Thus, the degree to which *all* dischargers must be subject to compliance schedules remains an open question after *Pinto Creek*.

If sufficient load reductions cannot be obtained via compliance schedules for point sources, then EPA can only issue a new permit if it can convince a state to mandate reductions in nonpoint source loading via a compliance schedule. *Id.* at 18. This position is contrasted with an earlier Ninth Circuit decision in *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987), which held, "We do not agree with plaintiffs that Congress intended [Section 301] to apply to nonpoint sources."

**Implications of Pinto Creek**

*Pinto Creek* leaves a host of unanswered questions in its wake. It is unclear from the decision what types of discharges are to be restricted by the Ninth Circuit's broad reading of 40 C.F.R. § 122.4(i). The *Pinto Creek* decision involves an industrial discharge from a mining operation. Does the Ninth Circuit's

CWA Prohibition

Net Environmental Benefit

Ban Rejected

Rule Ambiguity

Per Se Violation?

Exception

TMDL Inclusions

Unanswered Questions

**Pinto Creek****MS4s****Development  
Preclusion?****TMDL Inclusion  
Questions****Innovations  
Discouraged?****New Rules?**

prohibition on new sources extend only to traditional point sources such as industrial and municipal wastewater discharges, or did the court intend that its decision would extend to stormwater discharges from municipal separate storm sewer systems (MS4s) and construction sites (which are also subject to NPDES general permits in most states)? The NPDES regulations do not preclude such a result. 40 C.F.R. § 122.4 applies to either a “new source” or a “new discharger” and the pertinent definitions in 40 C.F.R. § 122.2 could be construed to include “new” stormwater “discharges.”

If the court did intend to extend the prohibitive effect of 40 C.F.R. § 122.4(i) to stormwater discharges, then *Pinto Creek*, taken to its logical extreme, could be interpreted to preclude *all development* in excess of one acre (the threshold for filing of a notice of intent under EPA’s NPDES Phase II Stormwater Program) in impaired watersheds. The 2002 Section 305(b) Report, *supra*, indicated that nearly 50% of watersheds in the US are impaired by some pollutant. Could Congress have actually intended in passing Section 303(d) of the CWA to impose what amounts to a de facto building moratorium on up to one half of the watersheds in the country? Such a result would wreak havoc on local economies and potentially expose the states and EPA to limitless inverse condemnation claims from property owners precluded from developing their properties by 40 C.F.R. § 122.4(i).

Additionally, the *Pinto Creek* decision is ambiguous vis-à-vis whether *all* “point source” dischargers in the watershed, or only a number sufficient to demonstrate compliance with water quality standards, must be subject to compliance schedules before issuance of new permits (as discussed above). Nor does the court explain how EPA (or a state permitting entity) might establish a compliance schedule for an ownerless point source (such as the abandoned Gibson Mine). A compliance schedule is meaningless without an owner/operator that can execute its requirements. In this vein, the decision ignores the fact that many watersheds in the country exceed pertinent water quality standards by virtue of NPS loading alone (to include situations where natural background levels exceed water quality standards). For NPS loadings (which include atmospheric deposition and diffuse runoff from any number of different land uses) there often will not be an owner or operator that can be made subject to a compliance schedule (assuming that a state even has the regulatory authority to impose such conditions on landowners who are not point sources of discharge). In addition, the owner/operator may not have the financial means to comply even if otherwise willing. Thus, although the Ninth Circuit denied that it was applying a categorical ban on all point source discharges to impaired watersheds (*Pinto Creek* at \*19), the difficulty, and in many cases impossibility, of complying with the pre-conditions established by the court will in many circumstances result in a de facto prohibition on the issuance of new NPDES permits in 303(d) listed watersheds.

Under such circumstances, the value of recent innovations in water quality policy and management could be greatly diminished. EPA’s water quality trading program, a useful and emerging tool in the fight against water quality impairment, would be particularly susceptible to a devaluation of offsets. See *Env’tl. Prot. Agency, Final Water Quality Trading Policy*, 68 Fed. Reg. 1609 (Jan. 13, 2003): “Finding solutions to...complex water quality problems requires innovative approaches that are aligned with core water programs. Water quality trading...offers greater efficiency in achieving water quality goals on a watershed basis. It allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs.”

### Prudent Actions in Light of the *Pinto Creek* Decision

*Pinto Creek* unquestionably poses a compliance challenge for those seeking to discharge (and develop) in and around a 303(d) listed watershed in the western US. However, there a number of actions stakeholders (and EPA) can take to help minimize the impact of the decision.

### Change the Regulations for NPDES Issuance in Impaired Watersheds

The Ninth Circuit based its *Pinto Creek* decision almost entirely upon its interpretation of the meaning of 40 CFR § 122.4(i) and not upon a specific prohibition in the CWA. The court gave EPA’s interpretation of its own regulations no deference in the process (see note 14, *supra*). Such a position is seemingly in stark contrast to the Supreme Court’s decision in *Arkansas v. Oklahoma*, 503 U.S. 91, 108: “Although the Act [CWA] contains several provisions directing compliance with state water quality standards... the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards.” Accordingly, nothing in *Pinto Creek* would appear to prevent EPA from promulgating new rules along the lines suggested by the Supreme Court in *Arkansas v. Oklahoma*, 503 U.S. at 111-12, which approved an administrative law judge’s determination that a discharge to 303(d) listed waters required *detectable or measurable* degradation of water quality before running afoul of

**Pinto Creek****Offset  
Clarification**

CWA's antidegradation prohibition. At a minimum, the EPA should clarify by regulation, that where a new discharge to 303(d) listed waters will be consistent with load allocations in a TMDL (if applicable), and will otherwise be offset by pollution reductions elsewhere within the watershed, then a permitting agency has the discretion to authorize such a discharge. Revising 40 CFR § 122.4(i) in such a manner would comport with the Supreme Court's guidance that new and environmentally beneficial projects not be stifled by a categorical ban that does nothing to improve the status quo. EPA should also use the rulemaking as an opportunity to clarify that 40 CFR § 122.4(i) does not apply to stormwater discharges.

**Limited  
Application****Pinto Creek Application to Stormwater Discharges from an MS4**

While a clarifying statement from the EPA would be helpful, given the ambiguity in 40 CFR § 122.2 on what constitutes a "new discharge" for purposes of 40 CFR § 122.4(i), local governments have a very strong argument that the *Pinto Creek* decision has limited (if any) application to discharges from MS4s. There is a distinction between industrial and wastewater permits administered under the NPDES program on the one hand, and the MS4 program (which implements Section 402(p)(3)(B) of the CWA) on the other. Stormwater will flow, permit or not, whenever it rains. It makes no sense (and is physically impossible) to *prohibit* all municipal stormwater discharges into waterbodies that are currently listed as "impaired" under Section 303(d) — particularly during high flow rain events. The Ninth Circuit recognized the Congressionally sanctioned distinction between MS4 Permits and other types of NPDES permits in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). *Defenders of Wildlife* held that MS4 dischargers are not required to achieve strict compliance with state water quality standards. Rather, MS4 dischargers must treat stormwater to the **maximum extent practicable** (MEP). They are not precluded from discharge if MEP does not result in the attainment of all pertinent water quality standards. *Id.* Moreover, most MS4 discharge points have been in place for many years and are accordingly outside the ambit of 40 CFR § 122.4(i). See *City of Waco v. Tex. Natural Res. Conservation Comm'n*, 83 S.W.3d at 176 n.6, where the court observed that "[s]ection 122.4(i) applies only to a permit for a new source or discharger," and does not apply to "additional or expanded uses" by the same source.

**"MEP"****Construction  
Permits****Pinto Creek Application to Discharges from Construction Sites**

Construction activities on sites in excess of one acre are characterized as a type of "industrial" activity under EPA's Phase II Stormwater Program. 64 Fed.Reg. 68722 (Dec. 8, 1999); 40 C.F.R. § 122.26(b)(15). They are accordingly administered in most states (and by EPA in states where EPA is the permitting agency) through a general NPDES permit program (40 C.F.R. § 122.28). Industrial stormwater permits have their genesis in Section 402(p)(3)(A) of the CWA — and, unlike MS4 permits, *are tied to attainment of water quality based effluent standards*. Thus, environmental groups may try to assert that *new* construction in excess of one acre constitutes a "new" point source discharge that is subject to the restrictions of *Pinto Creek*.

**Defining  
"Discharge"**

Other than identifying for the regulators the public policy nightmare that would occur if every construction project had to first ensure the existence of basin-wide compliance schedules for every point source in the watershed prior to turning a spade, there are other reasonable ways to distinguish *Pinto Creek* in the construction context. First, there is arguably no *new* "discharge" in the context of stormwater associated with construction, where pollutants — if any — are transported offsite during rain via diffused "runoff," a nonpoint source. Note that 40 C.F.R. § 122.2 states that surface runoff must be "collected or channeled by man" before it will be deemed a "discharge." Instead, the "point source" is the conveyance that receives the runoff pollution from the construction site, an *existing* storm sewer system conveyance that then "discharges" to waters of the US. Thus, with a construction site, there is often no "new" discharge of pollutants at all — merely diffused flow into an existing stormwater conveyance that does not become "new" by virtue of increased stormwater volume or pollutant concentrations (compare *City of Waco, supra* at 176 n.6).

**General Permits**

Second, control of construction project-related runoff is typically administered through *existing* general permits issued (and re-issued) every five years by a permitting agency to an entire category of stormwater sources. See generally 40 C.F.R. § 122.28(a)(2)(i), which provides that water quality based effluent limits should be the same for all sources within the same category or sub-category. The developer submits a notice of intent to obtain coverage under the *existing* general permit, not a new permit application, and is then subject to the same water quality based standards, if any, as others within the same category. 40 C.F.R. § 122.28(a)(3). If faced with the question, developers and their counsel could argue that there is no indication that EPA in 40 C.F.R. § 122.4(i) nor the Ninth Circuit in *Pinto Creek* intended to apply a "new" discharge prohibition to *existing* general permits which typically regulate large classes of dischargers throughout an entire state.

**Pinto Creek**

**Compliance Schedule**

**All Dischargers?**

**Nonpoint Issues**

**Changing Water Quality Determinations**

**Difficulties Remain**

**Plan to Attain Water Quality Standards in Accordance With Compliance Schedules**

Though this option will not be feasible in many water quality impaired segments, some watershed stakeholders will be able to avail themselves of the new permit approval process described in *Pinto Creek*. This option may be particularly viable in watersheds where impairment is linked to loading from actively managed point sources, and the increment of improvement needed to meet water quality standards is reasonably achievable with the implementation of new technology and best management practices.

Stakeholders seeking to obtain a “new” permit after *Pinto Creek* should first advocate that the Ninth Circuit’s decision does not mandate the participation of *all* point source dischargers in the watershed (as some, like the Gibson Mine in *Pinto Creek*, may be hard to get to the table). Second, to the extent feasible, the permit applicant and permitting agency should attempt to bring in nonpoint sources of pollutant loadings (via state regulation or voluntary agreement), and require them (via a compliance schedule) to implement best management practices that will reduce NPS pollutant loadings over time. In many watersheds, NPS loading is the primary source of impairment, and it may be difficult to demonstrate future attainment of all pertinent water quality standards in the absence of meaningful NPS controls. If a TMDL is already in place, then sources of NPS pollution will have already received a “load allocation” indicating how much pollutant the waterbody can assimilate from NPS pollution and still meet water quality standards. However, because EPA does not typically have regulatory jurisdiction over sources of NPS pollution, participation of state and local governments — with the power to enforce land use controls — is imperative.

**Create “New” Assimilative Capacity**

**DEVELOP A SITE SPECIFIC STANDARD OR CONDUCT A USE ATTAINABILITY ANALYSIS**

Attainment of *existing* water quality standards — even over time — may not be a technically feasible alternative in many watersheds. This may be the reality for a variety of reasons ranging from improper beneficial use designations to high natural background levels of an “impairing” pollutant. After *Pinto Creek*, failure to demonstrate attainment of water quality standards over time is fatal to a “new” permit application. However, there remain at least two potential avenues of relief. Development of a site specific standard (SSS) or a successful **use attainability analysis (UAA)** will result in changes to the pertinent water quality standards such that they can potentially be met over time.

40 C.F.R. Part 131 provides procedures for the establishment and review of state water quality standards and uses. Development of an SSS requires a demonstration that existing beneficial uses are still protected at higher pollutant concentrations on a site specific (or seasonal) basis, while a UAA requires demonstration that the most sensitive beneficial uses do not currently exist in the watershed — thereby eliminating the need for more stringent water quality standards to protect them. (See generally California State Water Resources Control Board, State of California S.B. 469 TMDL Guidance, A Process For Addressing Impaired Waters in California § 6.3.(June 2005)).

As previously referenced, development of an SSS is the approach that the State of Arizona is currently pursuing on Pinto Creek in light of the litigation surrounding the Carlota Mine application and continued copper loading from naturally occurring sources (see *Background* above). With successful implementation of an SSS or UAA, additional loading can be freed up — allowing attainment of revised water quality standards via compliance schedules. If the UAA or SSS is particularly successful an impaired water quality segment may be delisted outright.

**Conclusion**

The Ninth Circuit’s decision in *Pinto Creek* does not make water quality compliance decisions any easier. With many watersheds across the western US listed as “impaired” under Section 303(d), and because the Ninth Circuit now mandates the implementation of compliance schedules for all (or most) point sources prior to the issuance of any new NPDES permit in and around impaired water quality segments, the decision is likely to impact a significant amount of people (and greatly enhance watershed stakeholder efforts to develop SSSs and UAAs). The court’s holding also puts regulators in a difficult position vis-à-vis meritorious NPDES applications where compliance schedules are not a feasible option. A new permit applicant, as in *Pinto Creek*, often has the incentive to undertake significant mitigation in order to get its project approved and implemented. After *Pinto Creek*, however, EPA no longer has the discretion to weigh a project’s overall benefits and determine that, on the whole, issuance of a new NPDES permit is a net win for the environment. The Ninth Circuit’s “all or nothing” approach to addressing 303(d) impairment may result in less clean-ups occurring because many dischargers may conclude that the path to permit approval is now just too steep. Hopefully EPA will revise 40 C.F.R § 122.4(i) to clarify that projects with a net benefit on water quality may proceed without initiating a watershed wide clean up.

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CASE WEBSITE: *Friends of Pinto Creek* complete case available at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=9th&navby=year&year=2007-10>

LEXIS WEBSITE: *Friends of Pinto Creek v. U.S. Env'tl. Protection Agency*, No. 05-70785, 2007 U.S. App. LEXIS 23251 (9th Cir. Oct. 4, 2007)

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**Pinto Creek Listing****Applicable Rule****CWA & Offsets****"Lessening" Not Enough****Quotes from Pinto Creek (Case No. 05-7078; October 4, 2007)**

Due to excessive copper contamination from historical mining activities in the region, Pinto Creek is included on Arizona's list of impaired waters under § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), as a water quality limited stream due to non-attainment of water quality standards for dissolved copper. Slip Op. at 13509

The Petitioners contend that as a "new discharger" Carlota's discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant violates the intent and purpose of the Clean Water Act. Under the NPDES permitting program, 40 C.F.R. § 122.4(i) addresses the situation where a new source seeks to permit a discharge of pollutants into a stream already exceeding its water quality standards for that pollutant. Section 122.4 states in relevant part:

No permit may be issued: . . .

(i) To a new source or a new discharger if the discharge from its construction or operation will cause EPA or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards . . . and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. 40 C.F.R. § 122.4 (2000).

*Id.* at 13514-13515

The EPA contends that the partial remediation of the discharge from the Gibson Mine will offset the pollution. However, there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water. The regulation does provide for an exception where a TMDL has been performed and the owner or operator demonstrates that *before the close of the comment period* two conditions are met, which will assure that the impaired waters will be brought into compliance with the applicable water quality standards. The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards. *Id.* at 13515-13516 (court emphasis)

In Carlota's case, there are no plans or compliance schedules to bring the Pinto Creek segment "into compliance with applicable water quality standards," as required by § 122.4(i)(2), which Carlota and the EPA both acknowledge is the applicable section with which Carlota must comply. The error of both the EPA and Carlota is that the objective of that section is not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters. *Id.* at 13519