Journal of Natural Resources & Environmental Law

Volume 17
Issue 2 *Journal of Natural Resources & Environmental Law, Volume 17, Issue 2*

Article 5

January 2003

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Recommended Citation

Casey, Christina L. (2003) "*Pronsolino v. Nastri* and TMDLs for Nonpoint Sources," *Journal of Natural Resources & Environmental Law*: Vol. 17: Iss. 2, Article 5.
Available at: https://uknowledge.uky.edu/jnrel/vol17/iss2/5

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PRONSOLINO V. NASTRI AND TMDLS FOR NONPOINT SOURCES

CHRISTINA L. CASEY*

I. INTRODUCTION

In 1972, Congress enacted the Clean Water Act (CWA).[1] The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] However, states have questioned whether Congress intended to include nonpoint source pollution, or pollution caused by water moving over and through the ground that picks up various natural and human pollutants along the way, in the CWA's water quality standards and planning program.

This Comment analyzes the Ninth Circuit Court of Appeals' treatment of the issue of nonpoint source regulation under the CWA in *Pronsolino v. Nastri*.[3] In *Pronsolino*, the court held that the CWA authorizes the Environmental Protection Agency (EPA) to establish total maximum daily loads (TMDLs) for waterways polluted solely by nonpoint sources of pollution.[4] This landmark ruling significantly furthers the EPA's efforts in restoring and cleaning up the nation's waterways.[5]

Section II of this Comment describes the statutory background of the CWA, and Section III discusses the history and procedural posture of *Pronsolino*. Section IV describes the Pronsolino's claims, the Ninth Circuit's analysis, and the Court's ultimate holding. Finally, Section V focuses on the impact of the Ninth Circuit's decision.

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[1]Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1994).

[2]33 U.S.C. § 1251(a) (1994).

[3]291 F.3d 1123 (9th Cir. 2002).

[4]*Id.*

[5]*See* Press Release, Environmental Protection Agency, Federal Appeals Court Upholds Landmark Clean Water Decision, *at* http://yosemite.epa.gov/r9/r9press.nsf/7f3f954af9cce39b882563fd0063a09c/812afe983bc2a79c88256bcd007d7cbc?OpenDocument (last visited Oct. 25, 2002) [hereinafter *Press Release*].

II. STATUTORY BACKGROUND

A. Point Source vs. Nonpoint Source Pollution

Congress enacted the CWA in an attempt to remedy the deficiencies of earlier legislation.[6] Unlike previous congressional action, the CWA targeted "the preventable causes of pollution,"[7] and in so doing, the Act divided pollution into two categories: point source and nonpoint source.[8]

The CWA defines point source pollution as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[9] Nonpoint source pollution, while not defined in the CWA itself, has been determined to include polluted runoff coming from "diffuse or scattered sources in the environment rather than from a defined outlet such as a pipe."[10] The sources of this polluted runoff include, among other things:

> excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas; oil, grease, and toxic chemicals from urban runoff and energy production; sediment from improperly managed construction sites, crop and forest lands, and eroding streambanks; salt from irrigation practices; acid drainage from abandoned mines; and bacteria and nutrients from livestock, pet wastes, and faulty septic systems.[11]

The CWA controls point source pollution through directly mandated technological controls.[12] However, no such control over nonpoint source pollution exists.[13] Rather, nonpoint source pollution is constrained by "the 'threat and promise' of federal grants to

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[6]Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002).

[7]*Id.* (quoting EPA v. State Water Resources Control Bo., 426 U.S. 200, 202-03 (1976)).

[8]*Pronsolino*, 219 F.3d at 1126.

[9]33 U.S.C. § 1362(14) (1994).

[10]Environmental Protection Agency, *What is Nonpoint Source Pollution?*, *at* http://www.epa.gov/region4/water/nps/ (last visited Oct. 25, 2002).

[11]*Id.*

[12]*Pronsolino*, 219 F.3d at 1126.

[13]*Id.*

states to accomplish th[e] task"[14] of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use... of land and water resources."[15]

B. Section 303 - Provisions for Water Quality Standards and TMDLs

Section 303 of the CWA requires states to establish water quality standards for all waters within their boundaries. If a state fails to do so or if the EPA determines a state has not sufficiently complied with these requirements, the EPA will establish appropriate water quality standards for that state.[16] Section 303(d) specifically requires states to identify waterways with insufficient controls and to establish the total maximum daily load for pollutants upon those waters.[17]

CWA § 303(d) provides the method of identifying waterways with insufficient controls as follows:

> Each State shall identify those waters within its boundaries for which the effluent limitations required by . . . this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.[18]

After such identification, a state must establish TMDLs for those waterways.[19] "A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the

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[14] *Id.* at 1126-27 (quoting Or. Natural Desert Assoc. v. Dombeck, 172 F.3d 1092, 1096 (9th Cir. 1998)).

[15] *Pronsolino*, 291 F.3d at 1126-27 (quoting 33 U.S.C. § 1251(b)).

[16] *Id.* at 1127; *see also* 33 U.S.C. § 1313(c)(2) ("[W]ater quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." *Id.*)

[17] 33 U.S.C. § 1313(d) (1994).

[18] 33 U.S.C. § 1313(d)(1)(A) (1994).

[19] 33 U.S.C. § 1313(d)(1)(C) (1994).

waters at issue from all combined sources,"[20] and must be "established at a level necessary to implement the applicable water quality standards."[21]

Upon completion of the above steps, states must submit their priority list and their TMDLs to the EPA for review.[22] If the EPA is not satisfied with the states' findings, it will establish its own priority list and TMDLs for the state.[23] Implementation of the TMDLs is then relegated to the states through their continued planning processes.[24]

III. CASE HISTORY

In 1960, Betty and Guido Pronsolino acquired approximately 800 acres of heavily logged timber land in the Garcia River watershed in Mendocino County, California.[25] In 1998, after the forest had significantly re-grown, the Pronsolinos applied for a permit with the California Department of Forestry to begin re-harvesting on the timber land.[26] The department granted the application for the permit, but it contained numerous restrictions upon the land's use.[27] The cost of the Pronsolino's compliance with these considerable restrictions was estimated at $750,000.[28] In addition to the Pronsolinos, Larry Mailliard and Bill Barr were property owners who had applied for harvesting permits within the Garcia River watershed, and compliance with their individual restrictions was estimated to cost $10,602,000 and $962,000, respectively.[29]

The TMDL restrictions placed upon the waterway resulted in abundant limitations upon the harvesting permits of property owners within the Garcia River watershed.[30] The Garcia River was omitted from the requisite CWA priority list California sub-

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[20] *Pronsolino*, 291 F.3d 1123, 1128 (quoting Dioxin/Organochlorine Ctr v. Clarke, 57 F.3d 1517, 1520 (9th Cir. 1995)); *see also* Or. Natural Desert Assoc. v. Dombeck, 172 F.3d 1092, 1097 (stating that the term "discharge" refers only to pollution from point sources.); *see also* 40 C.F.R. § 130.2(e) (2000) (stating that the term "loading" refers to pollution of a body of water from either point source or nonpoint sources).

[21] 33 U.S.C. § 1313(d)(1)(C) (1994).

[22] 33 U.S.C. § 1313(d)(2) (1994).

[23] *Id.*

[24] *Id.*

[25] *Pronsolino*, 291 F.3d at 1129.

[26] *Id.*

[27] *Id.* at 1129-30.

[28] *Id.* at 1130.

[29] *Id.*

[30] *Id.* at 1129.

mitted to the EPA and the list was accordingly disapproved.[31] By way of remedy, the EPA established the new priority list for California, including within it the Garcia River and sixteen other waterways polluted solely by nonpoint sources.[32] Nevertheless, California remained defiant and did not establish TMDLs for the Garcia River and the other waterways added by the EPA until a consent decree required such action.[33] Thereafter, the EPA established the Garcia River TMDL for sediment at 552 tons per square mile per year, allocated among: "a) 'mass wasting' associated with roads; b) 'mass wasting' associated with timber-harvesting; c) erosion related to road surfaces; and d) erosion related to road and skid trail crossings."[34]

On August 12, 1999, the Pronsolinos, the Mendocino County Farm Bureau, the California Farm Bureau Federation and the American Farm Bureau Federation brought suit against the EPA and its administrators, "challenging the EPA's authority to impose TMDLs on rivers polluted only by nonpoint sources of pollution and sought a determination of whether the [Clean Water] Act authorized the Garcia River TMDL."[35] The United States District Court for the Northern District of California granted summary judgment in favor of the EPA.[36]

IV. THE NINTH CIRCUIT'S ANALYSIS

A. Holding

On appeal, the Ninth Circuit Court of Appeals held that, pursuant to the CWA, when a state fails to timely establish such TMDLs, the EPA is properly authorized to include priority lists in § 303(d)(1) and to determine TMDLs for waterways polluted solely by nonpoint sources of pollution.[37] Furthermore, the court resolved any ambiguity by granting substantial deference to the EPA's reasonable interpretation.[38]

B. Deference to the EPA

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[31] *Pronsolino*, 291 F.3d at 1123.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1130.
[36] *Id.* (citing Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000)).
[37] *Pronsolino*, 291 F.3d at 1140-41.
[38] *Id.* at 1141.

The EPA contended in *Pronsolino* that it was entitled to deference pursuant to *Chevron U.S.A., Inc. v. Natural Res. Def. Council*.[39] According to *Chevron*, a court must "defer to an agency's interpretation so long as it is reasonably consistent with the statute,"[40] and an agency is entitled to such deference if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[41] The Pronsolinos contended the EPA was entitled to no deference at all; they alleged that the EPA had inconsistently interpreted § 303(d) and that the current interpretation being asserted against them had no force of law.[42] In addition, the court noted that a third option of deference existed pursuant to *Skidmore v. Swift & Co.*[43] In *Skidmore*, deference is at the midpoint of the spectrum, permitting deference according to the persuasiveness of the agency's position.[44]

The Ninth Circuit Court of Appeals ultimately determined that the EPA was entitled, at the very least, to deference pursuant to *Skidmore*, and probably also under *Chevron*.[45] It was uncontested that the EPA possessed general rule-making authority pursuant to Congressional delegation; however, whether that authority was properly exercised was in dispute.[46] Nevertheless, the court determined that EPA regulations regarding § 303(d)(1) lists and TMDLs "focus on the attainment of water quality standards, whatever the source of any pollution."[47] Because of these regulations and various other factors, including delegated authority of the EPA concerning the CWA and the agency's understanding of the applicable regulations, the court felt that *Chevron* deference was appropriate.[48] Yet, the court found that the EPA had met the lesser standard of deference set forth in *Skidmore*, making an ultimate determination on the appropriate level of deference unimportant.[49]

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[39] *Id.* at 1131 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

[40] *Id.*

[41] *Id.* (quoting United States v. Mead, 553 U.S. 218, 226-27 (2001)).

[42] *Pronsolino*, 291 F.3d at 1131.

[43] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[44] *Pronsolino*, 291 F.3d at 1123.

[45] *Id.* at 1134-35.

[46] *Id.* at 1131.

[47] *Id.* at 1132-33; *see also, e.g.*, 40 C.F.R. § 130.2; 40 C.F.R. §130.3; 40 C.F.R. § 130.6; 40 C.F.R. § 130.7.

[48] *Pronsolino*, 291 F.3d at 1133.

[49] *Id.*

The court noted that the EPA had been consistent in requiring that solely nonpoint source polluted waters be identified in the state's § 303(d)(1)(A) list.[50] While, admittedly, the EPA had been lax on the enforcement of the inclusion of nonpoint source pollution within the priority list prior to the 1990s, the requirement was nonetheless present, and the EPA's position was adequately supported.[51]

C. Language and Structure of the CWA

As previously noted, CWA § 303(d)(1)(A) requires priority listing and TMDL calculation for "those waters within [the state's] boundaries for which the effluent limitations required . . . *are not stringent enough to implement any water quality standard* applicable to such waters."[52] The Pronsolinos asserted the above-quoted language could apply only to point source pollution because only point source pollution is subject to effluent limitations.[53] The EPA claimed the wording did not implicitly limit the application to point source pollution covered by effluent limitations, but rather the provision applied to all waters which could not meet *any* water quality standard.[54]

The Ninth Circuit Court of Appeals held that the interpretation of which water quality standards are stringent enough should concentrate on the broad goal the CWA sought to attain.[55] Based upon the overreaching goal of the CWA, the *Pronsolino* Court determined, "[The] ...sensible conclusion is that the § 303(d)(1) list must contain any waters for which the particular effluent limitations will not be adequate to attain the statute's water quality goals," thereby including nonpoint source polluted waterways.[56] By analyzing the manner in which the priority list was to have been compiled, the court further supported its holding.[57]

Pursuant to § 303(d), a state must initially identify *all* navigable waters within its boundaries.[58] Subsequently, any of the listed waterways which meet applicable water quality standards

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[50] *Id.* at 1134.
[51] *Id.* at 1134-35.
[52] *Id.* at 1135 (quoting 33 U.S.C. § 1313(d)(1)(A) (1994)) (emphasis added).
[53] *Pronsolino*, 291 F.3d at 1135.
[54] *Id.*
[55] *Id.* at 1136.
[56] *Id.*
[57] *Id.*
[58] *Id.*; 33 U.S.C. § 1313(d)(1)(A) (1994).

after application of point source technology are removed.[59] All waters remaining on the list, including nonpoint sources which obviously will not be removed in the above process, will have TMDLs established.[60] This construction evidences Congress' intent "that the EPA focus initially on implementing effluent limitations and only later avert its attention to water quality standards."[61]

Moreover, the Ninth Circuit Court of Appeals' previous holding in *Dioxin/Organochlorine Center v. Clarke*[62] supported this interpretation and holding. The court, when discussing *Clarke*, stated:

> the EPA acted within its statutory authority in setting TMDLs for toxic pollutants, even though the effluent limitations referenced by § 303(d)(1)(A) did not apply to those pollutants. The court explained that, since best practical technology effluent limitations did not apply to toxic pollutants, those limitations are, as a matter of law, 'not stringent enough' to achieve water quality standards.[63]

Accordingly, "not stringent enough" was held to be equivalent to "not adequate for" and "inapplicable to."[64] Per that construction, the mere fact that effluent limitations cannot be applied to nonpoint sources does not bar the required calculation of TMDLs because the statute would read as TMDLs must be established for "those waters . . . for which the effluent limitations required . . . are [inapplicable to] . . . such waters."[65]

Furthermore, the Ninth Circuit Court of Appeals rejected the premise that the CWA, as a whole, distinguishes between point and nonpoint sources.[66] While noting that in many areas the CWA does distinguish between the two types of pollution, the court determined the Act by no means does so in all instances.[67] One in-

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[59] *Pronsolino*, 291 F.3d at 1136; 33 U.S.C. § 1313(d)(1)(A) (1994).
[60] *Pronsolino*, 291 F.3d at 1136.
[61] *Id.* at 1136
[62] 57 F.3d 1517 (9th Cir. 1995).
[63] *Pronsolino*, 291 F.3d at 1137; *see also* Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517 at 1528.
[64] *Pronsolino*, 291 F.3d at 1137.
[65] 33 U.S.C. § 1313(d)(1)(A) (1994); *see Pronsolino* 291 F.3d at 1137.
[66] *Id.*
[67] *Id.*

stance in which the two sources are treated identically is when the § 303(d) list and TMDLs are compiled because "[w]ater quality standards reflect a state's designated *uses* for a water body and do not depend in any way upon the source of pollution."[68] CWA § 303(d) is "structurally part of a set of provisions governing an interrelated goal-setting, information-gathering, and planning process that, unlike many other aspects of the CWA, applies without regard to the source of pollution."[69]

D. Federalism Issues

Finally, by establishing TMDLs for nonpoint source polluted waters, the Ninth Circuit held the EPA had not infringed upon states' traditional control over land use.[70] The TMDLs established by the EPA do not specify the "load" from individual pieces of land nor do they dictate what measures the states must use in order to implement the TMDLs; rather, such issues are left to the respective states to determine.[71] Moreover, states are only required to implement TMDLs to the extent they are willing to forego federal grant monies because no other statutory provision provides for the implementation or enforcement of § 303 plans.[72]

V. IMPACT OF *PRONSOLINO V. NASTRI*

The Ninth Circuit Court of Appeals' decision in *Pronsolino v. Nastri* "affirms [EPA] efforts to continue using a strong tool to help restore America's rivers and clean up pollution regardless of its source."[73] Not surprisingly, "[n]onpoint source pollution is the dominant water quality problem in the United States today."[74] In fact, only one percent of California's waterways fail to meet water quality standards solely due to point source pollution; fifty-four percent of the state's polluted waters are due to solely nonpoint source pollution, and the remaining forty-five percent are a combination of the two.[75] This is certainly representative of the nation's waterways as a whole given the stringent technological

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[68] *Id.* at 1137; *see also* 33 U.S.C. § 1313(a)-(c) (1994).
[69] *Pronsolino*, 291 F.3d at 1138.
[70] *Id.* at 1140.
[71] *Id.*
[72] *Id.*; *see also* 33 U.S.C. § 1319 (1994); 33 U.S.C. § 1365 (1994).
[73] *Press Release*, *supra* note 5.
[74] *Id.*
[75] *Id.*

standards placed upon point sources.[76] While such dire conditions unquestioningly call for quick action by regulators and enforcers, the Ninth Circuit's ruling raises significant issues for states and individuals on their use of lands surrounding impaired waterways.

Given the wide range of activities that may contribute to polluted run-off into streams and waterways, universal application of the *Pronsolino* decision could have a tremendous impact upon agricultural activities, construction sites, mining and timber operations and even on homeowners. As noted previously, nonpoint source pollution arises from a multitude of everyday activities – i.e., fertilizer in flowerbeds, insecticide on crops, failing septic systems, animal waste and urban waste runoff. Under the *Pronsolino* decision, a homeowner who uses fertilizer on his lawn that runs into a polluted waterway could be faced with significant monetary outlay in order to continue upkeep of a well-manicured lawn.[77] A small, local farmer may be unable to continue grazing cattle or cultivating fruits and vegetables because of the significant restrictions placed upon such activity and the resulting substantial costs imposed upon him.[78] After all, the Pronsolino's were faced with a $750,000 bill in order to maintain the same activity that they had engaged in prior to the TMDL restrictions applied to their neighboring waterway.[79]

However, it must be recognized further that under the CWA scheme and pursuant to the holding in *Pronsolino*, states must determine how to achieve the TMDLs. Failure to require such reductions in polluted run-off will only result in a loss of federal funding to the states.[80] Accordingly, any impact of the

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[76]*See* Environmental Protection Agency, *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, at http://www.epa.gov/owow/nps/facts/point1.htm (last visited Oct. 25, 2002). "Today, nonpoint source (NPS) pollution remains the Nation's largest source of water quality problems. It's the main reason that approximately forty percent of our surveyed rivers, lakes, and estuaries are not clean enough to meet basic uses such as fishing or swimming." *Id.*

[77]*See* Environmental Protection Agency, *Managing Nonpoint Source Pollution from Households*, at http://www.epa.gov/owow/nps/facts/point10.htm (last visited Oct. 25, 2002). "Although the individual homes might contribute only minor amounts of NPS [nonpoint source] pollution, the combined effect of an entire neighborhood can be serious. These include eutrophication, sedimentation, and contamination with unwanted pollutants." *Id.*

[78]*See* Environmental Protection Agency, *Managing Nonpoint Source Pollution from Agriculture*, at http://www.epa.gov/owow/nps/facts/point6.htm (last visited Oct. 25, 2002). Such agriculture activities as confined animal facilities, grazing, pesticide spraying, irrigation, and fertilizing are the leading sources of nonpoint source pollution to rivers and lakes, the third largest sources to estuaries, and a major contributor to groundwater contamination and wetlands degredation. *See id.*

[79]Pronsolino v. Nastri, 291 F.3d 1123, 1129-30 (9th Cir. 2002).

[80]*See* 33 U.S.C. § 1313(d)(2) (1994); 33 U.S.C. § 1313(e) (1994); 33 U.S.C. § 1329(h); *see also id.* at 1128-29.

Pronsolino decision will be left to the individual states for implementation.[81] Given the state implementation, it is unlikely that any action will be taken against homeowners who fertilize their lawns or against someone with a faulty septic system. On the other hand, state implementation does little to allay the fears of construction companies, mining and timber operations, farmers and other such entities that contribute to nonpoint source pollution. Legislatures will be much more willing and likely to focus on business sources than on the everyday voter. Yet, the full reach of *Pronsolino* remains to be seen.

VI. CONCLUSION

Pronsolino v. Nastri is a landmark decision recognizing the CWA authorizes the EPA to establish TMDLs for waterways polluted solely by nonpoint sources of pollution. In doing so, the Ninth Circuit Court of Appeals made a remarkable impact upon the future attainment of the CWA's primary goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[82] regardless of the source from which the pollution derives. However, the entire effect of the decision rendered in *Pronsolino* remains unclear, as the battle for clean and safe waters rages within the individual state legislatures.

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[81] *See* Debbie Shosteck, *Pronsolino v. Marcus*, 28 ECOLOGY L.Q. 327 (2001). "[W]hile EPA's new TMDL regulations tighten the implementation requirements, issues of state sovereignty preclude EPA from requiring states to carry out the mandates of a federal statute. Under the Supreme Court's prevailing Tenth Amendment analysis, the federal government cannot enlist states to administer federal laws. As a result, unless a state enforces TMDLs for its waterways by imposing mandatory BMPs [best management practices], nonpoint source polluters will be allowed to dodge responsibility for meeting water quality standards." *Id.* at 353-54.

[82] 33 U.S.C. § 1251(a) (1994).