No. 08-17715

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARNUM TIMBER CO.,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
and LISA P. JACKSON, Administrator of the United States Environmental Protection Agency,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE APPELLEES

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Barnum Timber Company ("Barnum") sued the United States Environmental Protection Agency and Stephen L. Johnson[1/] (collectively, "EPA") in the United States District Court for the Northern District of California (Hon. William Alsup), invoking jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. (SER 1-15.)[2/] On September 29, 2008, the district court dismissed Barnum's complaint without to Barnum's moving for leave to amend the complaint. (ER 36-47.) On December 4, 2008, the district court denied Barnum's motion to amend the complaint and entered final judgment in favor of EPA. (ER 2-10.) Barnum filed a timely notice of appeal on December 15, 2008. (ER 1.) This Court's jurisdiction over Barnum's appeal of the district court's final judgment rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Barnum challenges EPA's decision to approve, pursuant to Section 303(d) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1313(d), California's 2006 list designating Redwood Creek as a water that fails to meet certain state water

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[1/] As noted in this Court's February 19, 2009 order, Lisa P. Jackson replaced Stephen L. Johnson as a party by operation of Fed. R. App. P. 43(c)(2).

[2/] Throughout this brief, "ER" refers to Barnum's Excerpts of Record, "Br." refers to Barnum's opening brief, and "SER" refers to EPA's Supplemental Excerpts of Record.

quality standards. The central question on appeal is whether the district court properly dismissed the complaint for lack of standing. That question turns on the following subsidiary issues:

> (1) Did the district court correctly conclude that any injury arising from the application of land-management rules promulgated and enforced by a state administrative agency is not fairly traceable to EPA; and
>
> (2) Did the district court correctly conclude that Barnum cannot show that a purported reduction in its property value is fairly traceable to EPA's actions or redressable by a ruling in Barnum's favor.

STATEMENT OF THE CASE

Barnum's complaint, filed on April 16, 2008, alleges that EPA violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, by arbitrarily and capriciously approving a list of impaired waters submitted by California pursuant to CWA § 303(d). (SER 1-15.) EPA moved to dismiss the complaint for lack of subject-matter jurisdiction. On September 29, 2008, the district court granted EPA's motion, concluding that Barnum failed to demonstrate standing, but allowed Barnum the opportunity to move for leave to amend the complaint. (ER 36-47.) Shortly thereafter, Barnum sought leave to amend the complaint, and EPA opposed. (ER 11-37.) On December 4, 2008, the district denied Barnum's motion and entered judgment in EPA's favor. (ER 2-10.)

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA's statutory scheme "anticipates a partnership between the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), in which "States remain at the front line in combating pollution," *City of Arcadia v. EPA*, 411 F.3d 1103, 1106 (9th Cir. 2006). *See also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."). Part of the CWA's cooperative approach to restoring and maintaining water quality is the use of distinctly different methods to address "point sources" and "nonpoint sources" of water pollution. *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002).

Point sources are "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act utilizes direct federal regulation to control discharges of pollutants from these sources. The Act authorizes EPA to establish technology-based effluent limitations for pollutants from point sources. *Id.* § 1311. As a means of achieving and enforcing those effluent limitations, the Act prohibits the discharge of

pollutants from point sources unless authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES") or a specific authorization under the CWA. *Id.* §§ 1311, 1342, 1344; *see also EPA v. California, ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

By contrast, states retain primary responsibility for programs designed to reduce pollution from nonpoint sources—*i.e.*, from non-discrete sources, such as sediment run-off from timber harvesting.[3/] *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009). The Act provides no direct federal mechanisms to control nonpoint sources of pollution, but rather uses the "threat and promise" of federal grants to encourage the development and implementation of such programs. *Pronsolino*, 291 F.3d at 1126-27. Central to this case is CWA § 303, 33 U.S.C. § 1313, which requires the

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[3/] As this Court observed:

> [N]onpoint sources of pollution have not generally been targeted by the CWA; instead they are generally excluded from CWA regulations, except to the extent that states are encouraged to promote their own methods of tracking and targeting nonpoint source pollution [. . .]. [T]he control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature [. . .]. This policy judgment appears consistent with Congress's reluctance [. . .] to allow extensive federal intrusion into areas of regulation that might implicate land and water uses in individual states.

Oregon Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 785 (9th Cir. 2008) (citations and quotation marks omitted).

states to set water quality standards, identify waters failing to meet those standards, and specify amounts of pollution that can be discharged from any source without exceeding those standards.

A. Water Quality Standards

Section 303(a)-(c) of the CWA requires states to adopt water quality standards for waters within their boundaries. 33 U.S.C. § 1313(a)-(c). To do so, a state first designates the use or uses to be made of a water (such as water supply, recreation, fish propagation, or navigation). *See* 40 C.F.R. § 131.10. Then, the state adopts the water quality criteria necessary to protect the designated use and an antidegradation policy to maintain the level of water quality necessary to protect existing water uses. *Id.* §§ 131.11, 131.12. If a state does not set water quality standards, or if the EPA determines that the state's standards are inadequate, the EPA promulgates standards for the state. *Pronsolino*, 291 F.3d at 1127 (citing 33 U.S.C. §§ 1313(b), (c)(3)-(4)).

B. Section 303(d) Lists

Each state must compile a list of waters that do not meet the applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A). The state must submit that list, known as a "Section 303(d) List," to EPA, along with documentation describing the methodology used to develop the list, the data and information used to identify the Section 303(d) waters, and a rationale for any decision not to use

any existing and readily available data and information for certain categories of waters. 40 C.F.R. § 130.7(b)(6)(i)-(iii). States are required to submit their Section 303(d) List to EPA for review every two years. *Id.* § 130.7(d)(1). EPA must approve or disapprove a state's Section 303(d) List within thirty days of its submission. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state's list, it must establish a list of impaired waters for the state within thirty days from the date of the disapproval. *Id.*; 40 C.F.R. § 130.7(d)(2).

C. Total Maximum Daily Load (TMDL) Development

The CWA requires a state to establish the "total maximum daily load" ("TMDL") for each waterbody-pollutant combination identified on its Section 303(d) List. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1)(ii). The TMDL must be established "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). The TMDL specifies the maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all combined sources. *Pronsolino*, 291 F.3d at 1127-28; *see also* 40 C.F.R. § 130.2(g)-(*i*) (defining a TMDL for a pollutant as the sum of the "wasteload allocation" for point sources, the "load allocation" for nonpoint sources or natural background, and a margin of safety).

The state must submit TMDLs to EPA for review and approval. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state TMDL submission, EPA must establish the TMDL itself. *Id.*; *Pronsolino*, 291 F.3d at 1128.

D. State Implementation of TMDLs

A TMDL is not self-executing; instead, it "serves as an informational tool or goal for the establishment of further pollution controls." *City of Arcadia*, 411 F.3d at 1105. Although the TMDL must be submitted to EPA for approval, 33 U.S.C. § 1313(d), 40 C.F.R. § 130.7(d)(1), the state ultimately chooses "both *if* and *how*" it will implement the nonpoint source provisions of a TMDL, *Pronsolino*, 291 F.3d at 1140 (emphases in original).[4/] The CWA does not require states to implement the reductions identified in a TMDL for nonpoint source discharges; rather, EPA may use federal grants to encourage states do so. *Id.* at 1128-29; *see also* 33 U.S.C. § 1329(h) (providing for grants of federal funds to the states to assist them with implementation of nonpoint source management programs). In other words, states must decide to implement nonpoint source limitations in

[4/] Limitations in loadings identified for point sources in a TMDL are implemented through the NPDES permit system, and EPA's permitting regulations require permits for point sources to include effluent limits that are consistent with the assumptions and requirements of wasteload allocations established in TMDLs. 40 C.F.R. §122.44(d)(1)(vii)(B).

TMDLs "only to the extent that they seek to avoid losing federal grant money . . . ." *Pronsolino*, 291 F.3d at 1140.

In California, the State Water Resources Control Board and Regional Water Quality Control Boards are the state entities with "primary responsibility for the coordination and control of water quality." *Pacific Lumber Co. v. State Water Res. Control Bd.*, 37 Cal. 4th 921, 933 (2006); CAL. WATER CODE § 13001. The state's list of impaired waters and TMDLs (including TMDL implementation plans) are approved by the state board. *See generally Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List* (Sept. 30, 2004) (available at *http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/ffed_303d_listingpolicy093004.pdf*). Although federal law does not require TMDLs to include implementation plans, California requires that water segments remain on California's Section 303(d) List until TMDLs have been completed and approved by EPA and implementation plans have been adopted. *Id.* at 3.

II. FACTUAL BACKGROUND

A. Redwood Creek

Barnum owns property and conducts timber-harvesting operations in the Redwood Creek watershed, near Eureka, California. (ER 12-13.) In 1992, California's EPA-approved Section 303(d) List designated Redwood Creek as a water failing to meet the state's water quality standards because it was impaired by

sediment. (ER 14.) In 1998, EPA established a TMDL for sediment for Redwood Creek pursuant to a consent decree. (ER 19.) The TMDL established by EPA does not include an implementation plan, and the state has yet to finalize such a plan. (*Id.*)

During the state's public-comment process for creating the Section 303(d) List in 2002, Barnum submitted comments and materials in an effort to convince the state's water authorities that Redwood Creek was not impaired. (ER 17.) Nevertheless, the state retained Redwood Creek on the list as impaired for sediment and, furthermore, designated the creek as impaired for water temperature. (*Id.*) EPA approved the portions of the state's 2002 Section 303(d) List dealing with Redwood Creek. (ER 14.) The state has yet to establish a TMDL for temperature in Redwood Creek or develop a corresponding implementation plan. (ER 19.)

When the state began the public-comment process for compiling its Section 303(d) List in 2006, Barnum again disputed the listing of Redwood Creek as impaired. (ER 18.) Nevertheless, the Section 303(d) List for 2006 again designated Redwood Creek as impaired for temperature. (*Id.*) In addition, the state included Redwood Creek as a segment impaired by sediment on the state's

list of water segments being addressed by EPA-approved TMDLs.[5] (*Id.*)

B. District Court Proceedings

On April 15, 2008, Barnum filed suit under the Administrative Procedure Act challenging EPA's approval of California's 2006 Section 303(d) List.[6] (SER 1-15.) The gravamen of Barnum's complaint is that the state used faulty data and a flawed methodology to support the conclusion that Redwood Creek is impaired by sediment and temperature, thereby rendering EPA's approval of the state's Section 303(d) List arbitrary and capricious. (SER 2.) The complaint asserts that Barnum "is presently and continuously injured by the Section 303(d) listing and will be further injured by the development and implementation of TMDLs because it will be forced to alter its land management practices and will be subjected to severe restrictions on the use of its land." (SER 9.) The complaint seeks both declaratory and injunctive relief. (SER 14-15.)

EPA moved to dismiss the complaint on the ground that Barnum lacks

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[5] While EPA does not believe that the "Water Quality Limited Segments Being Addressed" section of California's submission is part of California's Section 303(d) List, this brief assumes *arguendo* that it is, because the details regarding the various sections of California's submission are not pertinent to standing.

[6] In 2003, Barnum filed a lawsuit in California Superior Court against the State Water Resources Control Board, challenging the agency's decision to list Redwood Creek as an impaired waterbody. (ER 15.) The state court dismissed the suit in March 2008 on the ground that EPA was an indispensable party. (*Id.*)

Article III standing. (ER 41.) EPA argued that Barnum had failed to establish a cognizable injury that was caused by EPA's action and redressable by a ruling in Barnum's favor. (*Id.*) Barnum argued in opposition to the motion that it suffered an injury traceable to EPA's action because the Section 303(d) listing of Redwood triggered the application of Section 916.9 of California's Forest Practice Rules, CAL. CODE REGS. tit. 14, § 916.9, which specifies land-management requirements promulgated and enforced by the California Department of Forestry ("CDF").[7/] (ER 41.) In support of that argument, Barnum offered a declaration from a licensed forester, James Able, asserting that, because of its listing as an impaired waterbody, Redwood Creek would be subject to "rigorous . . . harvesting and timber growing restrictions" under Section 916.9 of the Forest Practice Rules. (SER 18.) Barnum also asserted that the Section 303(d) listing of Redwood Creek, standing on its own, causes a reduction in the value of Barnum's property.

[7/] CDF administers the Z'berg-Nejedly Forest Practice Act, CAL. PUB. RES. CODE § 4511 *et seq*., which regulates timber harvesting in California with an eye toward achieving "[t]he goal of maximum sustained production of high-quality timber products . . . , while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, . . . and aesthetic enjoyment." *Id.* § 4513. Although CDF has the authority to promulgate and enforces rules pertaining to the effects of timber operations on water quality, *see id.* §§ 4551.5, 4562.7, it does not supplant the State Water Resources Control Board and Regional Water Quality Control Boards as the state entities primarily responsible for coordinating and controlling of water quality, *Pacific Lumber Co.*, 37 Cal.4th at 933.

(ER 45.)

On September 29, 2008, the district court granted EPA's motion to dismiss, concluding that Barnum failed to establish that its alleged injuries, "all of which arise from *California* forestry regulations, were caused by or are in any way connected to the EPA's 2006 approval of California's listing of Redwood Creek." (ER 42 (emphasis in original).) The district court also rejected Barnum's assertion that it suffered a decrease in its property value caused by the Section 303(d) listing of Redwood Creek alone, noting that Barnum had offered "nothing to support this claim other than the bare allegation itself." (ER 45-46.)

Although the district court granted the motion to dismiss, its ruling allowed Barnum twenty days in which to move for leave to amend its complaint. (ER 47.) The district court added:

> Any such motion should be accompanied by a proposed pleading and the motion should explain why the foregoing problems are overcome by the proposed pleading. Plaintiff must plead its best case. Failing such a motion, all inadequately pled claims will be dismissed with prejudice.

(*Id.*)

Barnum moved for leave to amend the complaint. In the accompanying motion, Barnum asserted that it has standing to sue EPA because Redwood Creek's presence on the EPA-approved Section 303(d) List triggered the

application of another provision of CDF's Forest Practice Rules, Section 898.[8]
(SER 24-25.) According to Barnum, that provision requires Barnum "to expend significant time and money in considering special mitigation measures as part of any proposed timber harvest near a Section 303(d)-listed waterbody." (*Id.*)[9]

Barnum also reiterated its argument that EPA's approval of the Section 303(d) List "by itself, has inflicted upon Barnum a unique and discrete economic injury" in the form of reduced property values. (SER 23-24.) In support of this claim, Barnum attached to its proposed amended complaint a second declaration from Able and a declaration from another registered forester, Thomas Herman.

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[8] Section 898 of the Forest Practice Rules provides, in relevant part:

> When assessing cumulative impacts of a proposed project on any portion of a waterbody that is located within or downstream of the proposed timber operation and that is listed as water quality limited under Section 303(d) of the Federal Clean Water Act, the [registered professional forester] shall assess the degree to which the proposed operations would result in impacts that may combine with existing listed stressors to impair a waterbody's beneficial uses, thereby causing a significant adverse effect on the environment. The plan preparer shall provide feasible mitigation measures to reduce any such impacts from the plan to a level of insignificance . . . .

CAL. CODE REGS. tit. 14, § 898.

[9] Barnum also reprised its claim that Redwood Creek's Section 303(d) listing triggers the application of Section 916.9 of the Forest Practice Rules. (SER 25-26.) Barnum has apparently abandoned this claimed injury on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.").

(ER 20.) In Able's second declaration, he acknowledged that "[a] number of forestry, water quality, and endangered species regulations . . . reduce the value of Barnum's property," and that, "[b]ecause of the complexities of timberland appraisal, it is not possible to quantify" the loss in value attributable to the Section 303(d) listing alone. (ER 34.) Barnum's other declarant, Herman, likewise admitted that "[o]ther laws and regulations undoubtedly reduce the value of Barnum's property," and that "[i]t is not feasible to isolate the precise incremental loss in value . . . caused by the Section 303(d) listing." (ER 30.)

On December 4, 2008, the district court denied Barnum's motion for leave to amend the complaint, concluding that "amendment would be futile because the proposed amendment would not cure the standing problem." (ER 3.) Rejecting Barnum's claim of injury arising from the application of Section 898 of CDF's Forest Practice Rules, the district court reasoned:

> The California's Forestry Department, not the EPA, promulgated the regulations that caused [Barnum's] injury. . . . The fact that California independently chose to condition one of those rules in part on the EPA's otherwise-unrelated Section 303(d) decision does not mean that [Barnum's] harm is fairly traceable to the EPA. At root, the injuries [Barnum] alleges arise from California forestry regulations, not any action of the EPA.

(ER 9.)

The district court also rejected Barnum's claim of standing based on the alleged reduction in its property value. Noting the admissions in the declarations

that any injury arising solely from the listing itself could not be quantified, the district court concluded that the "proposed amendment offer[ed] nothing new" that would cause it to reconsider its earlier rejection of Barnum's theory of standing. (ER 7.)

In accordance with its earlier ruling granting the motion to dismiss, the district court entered final judgment in favor of EPA. (ER 2.) This appeal followed. (ER 1.)

SUMMARY OF THE ARGUMENT

To demonstrate Article III standing, the party invoking federal jurisdiction must show: (1) that it has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Standing will not lie if all that is shown is an injury resulting from the independent action of some third party not before the court.

The district court correctly found that any injury arising from Section 898 of CDF'S Forest Practice Rules is not fairly traceable to EPA for purposes of standing. Under the CWA, EPA's approval of the state's Section 303(d) List does not impose any federal regulatory requirements or controls on nonpoint sources of pollution such as sediment run-off or increased temperatures from Barnum's timber operation. Moreover, CDF's promulgation and enforcement of Section 898

of the Forest Practice Rules are not related to the CWA grant programs addressing nonpoint sources of pollution. Section 898 merely draws on the Section 303(d) listing process in CDF's unrelated efforts to regulate the effects of timber operations on the environment. Any adverse impact of Section 898 therefore results from the independent action of a third party, a state agency, which is not before the court.

The district court also correctly held that Barnum cannot show that a purported reduction in its property value is fairly traceable to EPA's actions or redressable by a ruling in Barnum's favor. The causal chain supporting Barnum's claim of standing—which includes potentially misinformed public opinion and purely hypothetical state regulations—relies on too many speculative inferences to connect its injury to EPA's challenged actions. Furthermore, because the declarations submitted by Barnum in support of its proposed amended complaint concede that it is "not possible" and "not feasible" to quantify the degree of harm attributable to EPA's actions, Barnum cannot show that EPA caused it harm or that a judgment in its favor would provide redress.

STANDARD OF REVIEW

Standing is a question of law that this Court reviews *de novo*. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008). The party invoking a federal court's jurisdiction bears the burden of establishing

its standing to sue. *Id*. at 1225.

This Court reviews the denial of a motion to amend the complaint for an abuse of discretion. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Denial of such a motion is proper where the proposed amendment would be futile. *Id.*

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT BECAUSE BARNUM LACKS ARTICLE III STANDING TO CHALLENGE EPA'S APPROVAL OF REDWOOD CREEK AS AN IMPAIRED WATER ON CALIFORNIA'S SECTION 303(d) LIST.

Article III, § 2, of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." At the core of Article III's case-or-controversy requirement are three inquiries that together constitute the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, the party invoking federal jurisdiction must show: (1) that it has "suffered an injury in fact"; (2) that the injury is "fairly trace[able] to the challenged action of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (citations and quotation marks omitted); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009); *Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1244 (9th Cir. 2008). The requirements of

causation and redressability ensure that there is an appropriate nexus between the alleged injury-in-fact and the claim for relief. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973).

Because Barnum acknowledges that EPA's approval of California's Section 303(d) List does not directly require or forbid any action on Barnum's part, the nexus between its asserted injuries and EPA's actions is, at best, an indirect one. *See Warth v. Seldin*, 422 U.S. 490, 504-05 (1978). That being so, Barnum faces a "substantially more difficult" burden in demonstrating causation and redressability. *Id.* at 505; *see also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir. 1994). Specifically, Barnum must demonstrate that EPA's actions had a "determinative or coercive effect" on a third party that caused Barnum harm. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Standing will not lie if all that Barnum shows is an injury resulting from "the *independent* action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517-18 (9th Cir.1992) (noting that standing depends on whether the asserted injury "is dependent upon the agency's policy," rather than "the result of independent incentives governing the third parties' decisionmaking process") (citations and quotation marks omitted).

On appeal, Barnum asserts that it has standing because EPA's approval of

California's Section 303(d) List caused Barnum two injuries: (1) the expenditure of time and money needed to comply with Section 898 of the Forest Practice Rules promulgated and enforced by CDF; and (2) a decrease in property values attributable to public perceptions that Redwood Creek will be subject to burdensome regulation at some time in the future. But as we now show, the nexus between EPA's actions and those alleged injuries is too remote and indirect to support Article III standing.

A. The District Court Properly Exercised its Discretion when it Denied the Motion to Amend the Complaint as Futile Because any Injury Arising from Section 898 of CDF'S Forest Practice Rules is not Fairly Traceable to EPA.

Barnum devotes the bulk of its brief to arguing that the harm occasioned by CDF's enforcement of Section 898 of the Forest Practice Rules is fairly traceable to EPA for purposes of standing. (Br. 12-18.) This argument was raised for the first time in Barnum's motion for leave to amend the complaint, and the district court did not abuse its discretion by denying Barnum's motion as futile. Any harm caused by Section 898 is not fairly traceable to EPA's actions, but is rather the result of the independent action of a party not before this Court.

At the outset, Barnum cannot dispute that, under the CWA, EPA does not directly regulate nonpoint sources of pollution, such as sediment run-off from Barnum's timber operation. *Pronsolino*, 291 F.3d at 1128-29; *see also*

Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former."). Nor does the CWA allow EPA to regulate nonpoint sources indirectly by compelling states to enact such regulation. *See Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) ("[T]he CWA does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways. . . .").

To be sure, EPA may withhold grant funding if states do not adequately address nonpoint sources. *See Oregon Natural Desert*, 550 F.3d at 785. States, however, have the ultimate discretion to decide both "*if* and *how*" they will undertake to control nonpoint sources of pollution. *Pronsolino*, 291 F.3d at 1140 (emphases in original). Given the state's independent role in that process, it therefore is doubtful that Barnum's injuries would be traceable to EPA even *if* Section 898 of the Forest Practice Rules were the product of EPA's nonpoint source grant program. *Cf. Boating Indus. Ass'n v. Marshall*, 601 F.2d 1376, 1383 (9th Cir. 1979) (holding that plaintiff failed to establish the causation element of standing where, even though defendants' action was a "significant straw in the wind," a third party determined the ultimate outcome of the process resulting in plaintiff's alleged injury).

Yet, Barnum's standing claim rests on even weaker foundations, for Section

898 has no connection to the EPA's CWA grant program. CDF is not responsible for developing or enforcing California's TMDL implementation plans. Instead, that responsibility belongs to the state and regional water resource control boards. Those entities have not established a plan for implementing the TMDL for sediment impairment in Redwood Creek; and, for temperature impairment, they have established neither the TMDL nor a corresponding implementation plan.

Indeed, as Barnum concedes, EPA has "*no role*" in CDF's enactment or enforcement of Section 898. (Br. 15 (emphasis added).) Section 898 merely draws on the Section 303(d) listing process in CDF's unrelated efforts to regulate the effects of timber operations on the environment. That being so, any adverse impact of Section 898 results from "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Defenders of Wildlife*, 504 U.S. at 562 (citation and quotation marks omitted).

Although Barnum places great reliance on the Supreme Court's decision in *Bennett* to support its claim of standing (Br. 15-16), that case is easily distinguished. In *Bennett*, the Court considered a challenge by a group of ranchers and irrigation districts to the Fish and Wildlife Service's issuance of a Biological Opinion concluding that a proposed project by the Bureau of Reclamation would likely jeopardize certain species protected by the Endangered Species Act, 16

U.S.C. § 1531 *et seq*. 520 U.S. at 160-61. The Fish and Wildlife Service argued that any alleged injury to the plaintiffs was not fairly traceable to the Biological Opinion because the Bureau retained ultimate responsibility for determining whether and how the project would proceed. *Id.* at 168. The Court, however, rejected that argument, recognizing that the Biological Opinion had "a powerful coercive effect" on the conduct of the Bureau. *Id.* at 169. As the Court observed, any action that ignored the Biological Opinion and harmed endangered species could result in substantial civil and criminal penalties. *Id*. at 170. As such, the Biological Opinion had a "virtually determinative effect" on the Bureau's decisions. *Id*. The Court therefore concluded that the plaintiffs' asserted injuries were fairly traceable to Fish and Wildlife Service's issuance of the Biological Opinion. *Id*. at 171.

Here, by contrast, neither EPA nor the Section 303(d) List exerts any "coercive" or "virtually determinative" effect on CDF in its adoption or enforcement of the Forest Practice Rules. CDF did not promulgate Section 898 on pains of EPA imposing civil or criminal penalties, or to comply with CWA § 303(d) or any other CWA requirement. Indeed, as Barnum admits, the "enactment of Section 898 . . . is concededly *not connected to any EPA action*." (Br. 17 (emphasis added).) The district court therefore correctly dismissed Barnum's complaint based on its conclusion that, "[a]t root, the injuries [Barnum]

alleges arise from California forestry regulations, not any action of the EPA." (ER 9.)[10]

B. The District Court Correctly Held that Barnum Cannot Show that a Purported Reduction in its Property Value is Not Fairly Traceable to EPA's Actions or Redressable by a Ruling in Barnum's Favor.

Barnum also claims that the Section 303(d) listing of Redwood Creek, by itself, reduces the value of its property. That claim, however, is far too speculative

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[10] This result is not altered by the earlier dismissal of Barnum's state court lawsuit against the State Water Resources Control Board, *see* note 6 *supra.* Although Barnum asserts that the state court dismissed the action "without prejudice to Barnum pursuing relief against EPA in federal court" (Br. 5), that ruling cannot bind this Court or create jurisdiction where none exists. *See State Eng'r of Nev. v. S. Fork Band of Te-Moak Tribe*, 339 F.3d 804, 808 (9th Cir. 2003); *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir. 1981) ("[S]tates have no power . . . to enlarge or contract federal jurisdiction."). Federal courts have limited jurisdiction, which is not expanded by the unavailability of another forum in which to sue. *North Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994). In any event, it is not inconsistent with the purposes of the CWA to preclude Barnum from challenging, by way of a suit against EPA, the state's determination that a particular water is impaired. The CWA is meant to be a floor, not a ceiling, such that states may impose water quality standards and pollution controls that are stricter than EPA would require. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1217 (9th Cir. 2008). Moreover, Barnum's alleged injuries are purely economic—not environmental—and are therefore outside the zone of interest protected by the CWA. *See generally Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-44 (9th Cir. 2005); *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (noting that a party who is not the subject of a challenged regulatory action should be denied a right of review if its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit"). To the extent Barnum believes that it has been injured by Section 898, it should seek redress from CDF by challenging its decision to tie its regulations to the Section 303(d) List.

and attenuated to establish Article III standing. Moreover, Barnum effectively concedes that the alleged reduction in property value is neither fairly traceable to EPA's actions nor redressable by a ruling in Barnum's favor. Accordingly, the district court properly dismissed the complaint for lack of standing.

"[W]here injury is alleged to occur within a market context, the concepts of causation and redressability become particularly nebulous and subject to contradictory, and frequently unprovable, analyses." *Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983). Barnum attempts to overcome those hurdles by describing a precise mechanism by which EPA's actions account for a reduced value of Barnum's property. According to Barnum, the source of the diminished property valued is the public perception, "accurate[] or not," that its land could "be subject to additional and onerous regulation" at some time in the future based on the Section 303(d) listing of Redwood Creek. (Br. 10.) That description, however, only highlights the speculative nature of its claim.

Any future regulation of nonpoint sources of water pollution in Redwood Creek would be imposed, if at all, by the state—not EPA. *See Pronsolino*, 291 F.3d at 1128-29, 1140. Accordingly, Barnum's alleged injury is one that results from "the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42. Furthermore, Barnum's brief identifies no concrete plans for regulations that will reduce its property values, much less a "certainly impending"

likelihood they will be enforced against Barnum. *Defenders of Wildlife*, 504 U.S. at 564 & n.2 (citations and quotation marks omitted). Simply put, such "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

In any event, a causal chain that includes potentially misinformed public opinion and purely hypothetical state regulations is insufficient to establish standing, both because of the uncertainty of the individual links and because each of those speculative links must hold for the chain to connect EPA's actions to the asserted injury. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008); *see also Simon*, 426 U.S. at 45 (finding that a party fails to demonstrating standing where "[s]peculative inferences are necessary to connect [the claimed] injury to the challenged actions"). And, given the degree of conjecture necessary to conclude that a ruling in Barnum's favor would reverse that chain of events, "the complaint suggests no substantial likelihood that victory . . . would result in" redress of Barnum's asserted injury. *Simon*, 426 U.S. at 45-46.

Indeed, Barnum's theory of causation and redress is even more speculative than the one this Court rejected in *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), where the plaintiffs alleged that a federal law that banned certain guns, while "grandfathering" others, caused the plaintiff's harm by making the grandfathered guns and ammunition more expensive. *Id.* at 1130.

This Court noted that the federal law was "neither the only relevant piece of legislation nor the sole factor affecting the price of grandfathered weaponry." *Id.* Thus, it concluded that "any finding that the [federal law] had a significant impact on the increase in prices of weapons would be tantamount to sheer speculation." *Id.*

Barnum acknowledges that its land is subject to a variety of regulation that influences the land's market value, including comprehensive land-management rules imposed by the CDF. (Br. 4, ER 30.) In addition, the declarations Barnum submitted in support of its proposed amended complaint establish that any alleged harm caused by EPA is impossible to separate from reductions in property value caused by those other sources.[11/] That is, the declarations specifically concede that it is "not possible" and "not feasible" to quantify the degree of harm attributable to EPA's actions. (ER 30, 34.) Given the admitted impossibility of establishing such a connection, Barnum cannot show that EPA caused it harm or that a judgment in its favor would provide redress. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) (noting that it "is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on

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[11/] It is proper for this Court to hold Barnum to the admissions in the declarations because materials attached to or incorporated in a complaint become part of the complaint for purposes of evaluating a motion to dismiss. *Coos County Bd. of County Commrs. v. Kempthorne*, 531 F.3d 792, 811 n.14 (9th Cir. 2008).

the merits impossible.”).

To be sure, both declarations assert in generic terms that a decline in Barnum’s property value is both “real” and “caused by” EPA’s actions. (ER 30, 34.) But affidavits submitted in support of a party’s claim of standing cannot rest on “general averments” or “conclusory allegations.” *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). Moreover, such general averments cannot be credited when they are contradicted by more specific facts—in this case, the admission by both declarants that it is impossible to isolate EPA’s actions as a cause of Barnum’s alleged harm. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007) (noting that a court’s need not “ignore specific factual details . . . in favor of general or conclusory allegations”), *cert. denied*, 128 S. Ct. 2055 (2008).

Because Barnum’s complaint and the accompanying declarations demonstrate the impossibility of proving causation or redressability, the district court correctly dismissed Barnum’s suit.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

EPA is not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,883 words.

4/02/2009 /s/Jason Walta
Date Signature of Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed two copies of the foregoing document by First-Class Mail to the following non-CM/ECF participant:

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