No. 07-1524

In The

Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF PINTO CREEK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and an implementing regulation, 40 C.F.R. § 122.4(i), prohibit the Environmental Protection Agency and the states from issuing permits for discharges from new sources into "impaired" waters, irrespective of conditions imposed to reduce the net pollution of such waters and improve overall water quality.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has actively participated in litigation to ensure the proper interpretation and application of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* *See, e.g.*, *National*

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the MSLF's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than MSLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Rapanos v. United States*, 547 U.S. 715 (2006) (*amicus curiae*); *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518 (2007) (*amicus curiae*); *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007), *cert. granted sub nom. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, No. 07-984, 2008 WL 243678 (U.S. June 27, 2008) (*amicus curiae*).

In addition, MSLF has over 20,000 members throughout the United States. Many of these members are engaged in mining activities that require them to secure permits under the CWA. These members will be directly affected if the Ninth Circuit's decision, severely restricting the discretion of the EPA to issue permits for discharges into waters that do not meet state water quality standards, is allowed to stand. Accordingly, MSLF respectfully submits this *amicus curiae* brief in support of the petition.

SUMMARY OF THE ARGUMENT

Under the CWA, the Environmental Protection Agency ("EPA") must delegate its National Pollutant Discharge Elimination System ("NPDES") permitting authority to States that have submitted a qualifying state-administered program. 33 U.S.C. § 1342(b);

National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2525 (2007). The States and the EPA are required to adhere to identical standards when administering their NPDES programs. 33 U.S.C. § 1342(a)(3); 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 123.25. This requirement ensures uniformity across the nation with regard to the discharge of pollutants into the waters of the United States.

The decision of the Ninth Circuit conflicts with a prior decision of this Court and also with decisions of the Minnesota Supreme Court and the Court of Appeals for the Commonwealth of Virginia. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va. App. 2005); *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007). If allowed to stand, this decision will impede uniformity and predictability because there are conflicting standards within and without the Ninth Circuit regarding the issuance of NPDES permits.

The Ninth Circuit should have followed this Court's precedent as the Minnesota and Virginia courts did. The EPA's position, that discharges into impaired waters are allowable if they are offset by remediation such that the discharges do not cause or contribute to a violation of state water quality standards, is a reasonable interpretation of 40 C.F.R. § 122.4(i) and is due deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). In light of statistics showing that 45-47 percent of the lakes, rivers, and streams in the United States are

considered impaired, allowing the EPA and state regulators to issue permits for discharges into impaired waters with offsets that improve water quality, though not bringing the water up to the level of state water quality standards, is the only way to ensure that the EPA is able to adequately balance environmental protection with the need for economic growth.

ARGUMENT

I. STATUTORY AND PROCEDURAL BACKGROUND.

A. The Clean Water Act, National Pollutant Discharge Elimination System, And State Water Quality Standards.

The CWA prohibits discharge of pollutants into waters of the United States except as authorized by specific provisions of the Act. 33 U.S.C. § 1311(a). Under Section 402 of the CWA, the EPA is authorized to issue NPDES permits for discharges of effluent from point sources into waters of the United States. 33 U.S.C. §§ 1342(a), 1362(14). These permitted discharges must comply with effluent limitation established according to technologically-based standards. 33 U.S.C. § 1311(b)(1)(A).

The EPA is required to delegate its NPDES permit authority to the state, if the state submits a program that meets statutory criteria. 3 U.S.C. § 1342(b); *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2525 (2007). The

statutory criteria are similar to the requirements applicable to the EPA-administered program and the EPA is required to meet the same "terms, conditions, and requirements" applicable to the states. 33 U.S.C. § 1342(a)(3), 33 U.S.C. § 1342(b)(1)(A), 40 C.F.R. § 123.25. Thus, the same statutory requirements apply to both the EPA and the state-administered programs. Authority to administer NPDES permit programs has been delegated to forty-five states. National Pollutant Discharge Elimination System, State Program Status, http://cfpub.epa.gov/npdes/statestats.cfm (last visited June 9, 2008).

Section 303 also requires states to promulgate water quality standards for bodies of water within the state and to adopt total maximum daily loads ("TMDL") for pollutants discharged into water bodies failing to meet water quality standards. 33 U.S.C. § 1313(a), (d); 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1). All NPDES permits must include a provision requiring discharges to comply with applicable state water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122(d).

In addition, the EPA is required to adopt "national standards of performance" "for the control of the discharge of pollutants which reflect[ ] the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology" for sources constructed after the adoption of such standards. 33 U.S.C. §§ 1316(a)(1)-(a)(2), 1316(b)(1)(B).

The EPA has promulgated standards for copper-producing mines. 40 C.F.R. §§ 440.100 *et seq.*, 440.100(a)(1).

The EPA has adopted a regulation authorizing the issuance of NPDES permits for discharges from a new source or a new discharger into waters that do not meet state water quality standards. 40 C.F.R. § 122.4(i). This regulation prohibits the issuance of a permit if the discharge will "cause or contribute to the violation of water quality standards." *Id.* The regulation goes on to provide that, if a TMDL establishing load allocations for the water has been adopted, the discharger must demonstrate that (1) there are sufficient pollutant load allocations for its discharges and (2) existing dischargers are subject to compliance schedules. *Id.*

B. The Instant Case.

Carlota Copper Company ("Carlota") plans to operate a copper mine near Globe, Arizona, partially on the land of the Tonto National Forest. Three bodies of water – Pinto Creek, Powers Gulch, and Haunted Canyon – are within the bounds of the proposed mining operation. In 1996, Carlota applied for a NPDES permit under Section 402 of the CWA, 33 U.S.C. § 1342, for discharge of excess storm-water runoff from waste rock dumps. This discharge would contain detectable amounts of copper and would reach Pinto Creek, which does not meet Arizona's water quality standards for copper. The EPA has

adopted a TMDL establishing copper load allocations for Pinto Creek.

In 2000, the EPA issued a NPDES permit to Carlota, authorizing outfall of storm-water from seven retention basins in the event of extreme storm events larger than the basins are designed to accommodate. The permit included an offset provision requiring Carlota to clean up Gibson Mine, an upstream mine that is no longer in use.

The EPA concluded that the offset condition would reduce net pollution in Pinto Creek; thus, Carlota's discharges would not "cause or contribute" to a violation of water quality standards and are not prohibited by the CWA or the regulation. *In re Carlota Copper Company*, 11 E.A.D. 692 (EAB 2004); Petitioner's Appendix ("Pet. App.") 122, 124, 164, 170.

The permit also requires Carlota to comply with Arizona water quality standards. In light of the offset provisions, the Arizona Department of Environmental Quality ("ADEQ") certified the final permit, including the two new conditions, as meeting state water quality standards, under Section 401 of the CWA, 33 U.S.C. § 1341; 11 E.A.D. 692. Pet. App. 42, 44 n.21.

Friends of Pinto Creek, *et al.* ("Friends") filed a petition for review with the EPA's Environmental Appeals Board ("EAB") challenging the issuance of the permit. The EAB determined that the permit had been properly issued and denied review. 11 E.A.D. 692.

Friends then filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit pursuant to Section 509(b)(1)(F) of the CWA, 33 U.S.C. § 1369(b)(1)(F), again challenging issuance of the permit; the EPA was respondent and Carlota was granted intervention. The Ninth Circuit held that the permit was in violation of the CWA and the regulation, 40 C.F.R. § 122.4(i). *Friends of Pinto Creek v. Environmental Protection Agency*, 504 F.3d 1007 (9th Cir. 2007). The Ninth Circuit held that the CWA and the regulation prohibit new source discharges in "impaired waters" and that "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." *Id.* at 1012. The Ninth Circuit concluded that Carlota's discharges would "cause or contribute" to water quality violations in violation of the regulation. *Id.* The Ninth Circuit also held that Carlota's discharges do not comply with the second sentence of the regulation authorizing new source discharges if (1) there are "sufficient remaining pollutant load allocations" and (2) "existing dischargers" are subject to "compliance schedules." *Id.* at 1016. The Ninth Circuit vacated the permit and remanded the case to the EPA for further proceedings. *Id.* at 1017.

Carlota then filed a petition for writ of certiorari with this Court.

II. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE STATES WITH REGARD TO THE ADMINISTRATION OF NPDES PERMITS.

One of the grounds provided by Supreme Court Rule 10(a) for granting a writ of certiorari is where "a United States court of Appeals . . . has decided an important federal question of law in a way that conflicts with a decision by a state court of last resort. . . ." The Ninth Circuit's decision directly conflicts with *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007).

In *Annandale*, the Minnesota Supreme Court held that the CWA and EPA regulation 40 C.F.R. § 122.4)(i) authorize the issuance of NPDES permits for new source discharges into impaired waters when the discharges are subject to offset conditions that prevent impairment of water quality. In *Annandale*, the Minnesota Pollution Control Agency issued a permit authorizing a municipal waste treatment facility to discharge phosphorous into an impaired watershed. Because the permit contained an offset provision requiring the removal of phosphorous from an old treatment facility in an amount that exceeded the discharges, the Minnesota Supreme Court held that the discharges did not "cause or contribute" to water quality violations and thus, were not prohibited by the EPA regulation. *Annandale*, 731 N.W.2d at 516-522. The Minnesota Supreme Court stated that this conclusion was based on this Court's opinion in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), which

held that there is nothing in the CWA to "prohibit any discharge of effluent that would reach waters in violation of existing water quality standards." *Annandale*, 731 N.W.2d at 524; *Arkansas*, 503 U.S. at 107. The Minnesota Supreme Court found this conclusion to be consistent with the CWA's grant of "flexibility and broad authority" to the EPA and the state-administered programs in developing long-range, area-wide programs for water quality. *Annandale*, 731 N.W.2d at 524.

Because the Ninth Circuit's decision conflicts with the Minnesota Supreme Court's holding that the CWA and the regulation authorize approval of discharges into impaired waters subject to offset conditions that improve water quality, this Court should grant the petition.

The Virginia Court of Appeals has also held that the CWA and a Virginia regulation identical to 40 C.F.R. § 122.4(i) allow the issuance of permits for discharges into impaired waters. *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va. App. 2005). The permit in *Crutchfield* contained a "self-sustaining limit" requiring that the concentration of the pollutant in the discharge must be lower that the concentration of the pollutant in the receiving water. Because the lower concentration of pollutant in the discharge would cause an improvement in the quality of the receiving water, the Virginia Appeals Court found that the permit did not violate the CWA or the regulation. *Crutchfield*, 612 S.E.2d at 255.

The courts in Virginia and Minnesota set up a case-by-case approach that allows the EPA and the various state-administered programs to exercise broad discretion and flexibility in issuing permits that improve the quality of state waters. Conversely, the Ninth Circuit has set forth a standard that does not allow discretion and will result in fewer permits issued for development near impaired waters. States adhering to the Ninth Circuit's decision, if that decision is allowed to stand, will lose the valuable tool that offset conditions provide. These states will be unable to issue permits that require a new discharger to clean up older inefficient sites that otherwise may not be cleaned up. This will impede the development of new technology that could significantly reduce pollutant discharge, because older sites that were in existence before the CWA may continue to discharge, but newer sites may not be permitted.

These consequences are far reaching considering the EPA's estimation that 45-47 percent of the Nation's waters do not meet water quality standards. U.S. Environmental Protection Agency, *National Water Quality Inventory: Report to Congress*, 2002 Reporting Cycle, at ES-2 (October 2007). Development along all of these waters will be impeded and offset measures that could gradually improve these waters will be blocked by this Ninth Circuit ruling.

The States of Virginia and Minnesota now have a different permitting standard than the States within the Ninth Circuit, yet, under the Act, the same NPDES permit requirements apply to both the EPA

and the States that have been delegated permitting authority. 33 U.S.C. §§ 1342(a)(3)-(b)(1)(A); 40 C.F.R. § 123.25. Other States may decide to follow the Ninth Circuit's interpretation or that of the courts in Virginia and Minnesota. The petition should be granted to resolve this conflict.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARKANSAS V. OKLAHOMA*.

In *Arkansas v. Oklahoma*, 503 U.S. 91, this Court reversed the Tenth Circuit Court of Appeals, which held that the CWA requires that "where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such a proposed source may not be permitted." *Id.* at 98; *State of Oklahoma v. EPA*, 908 F.2d 595, 620 (10th Cir. 1990). The Tenth Circuit held that discharges were impermissible even though they would not detectibly affect the river's water quality. That holding is strikingly similar to the holding of the Ninth Circuit in this case, and this Court should grant the petition and reverse the Ninth Circuit decision as well. This Court's grant of certiorari in *State of Oklahoma v. EPA* was based on "[t]he importance and the novelty of the Court of Appeals' decision." 503 U.S. at 98. This issue, though perhaps no longer completely novel, is still one of importance that should be addressed and finally resolved by this Court.

In *Arkansas v. Oklahoma*, this Court held that the permit had been properly issued and the EPA's interpretation of the CWA was entitled to substantial deference. The Court found "nothing in the Act to support" the Tenth Circuit's reading that "the Clean Water Act prohibits granting a NPDES permit under the circumstances of this case (i.e., where applicable water quality standards have already been violated)." 503 U.S. at 107 n.12.

The Ninth Circuit distinguishes *Arkansas v. Oklahoma* by asserting that it stands for the proposition that the CWA does not support a complete ban on permits for discharges into impaired waters. The Ninth Circuit goes on to state that its opinion is not a complete ban because it allows permits to be issued as long as the water body complies with water quality standards. *Friends of Pinto Creek,* 504 F.3d 1007, 1015. This analysis ignores the broader holding of *Arkansas v. Oklahoma* that:

> [R]ather than establishing the categorical ban announced by the Court of Appeals – which might frustrate the construction of new plants that would improve existing conditions – the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.

503 U.S. at 108. Taken as a whole, the holding in *Arkansas v. Oklahoma* emphasizes the discretion of the EPA in fulfilling the purpose of the CWA. Although the Court did not specifically address offset

conditions in *Arkansas v. Oklahoma*, the ruling is applicable to the present case (and was applied to a similar case by the Minnesota Supreme Court in *Annandale*). The mention of long-range plans to alleviate pollution indicates that the Court understands that water quality standard may not be met in an instant, but that the EPA must have the authority and discretion to implement standards and practices that work toward the future elimination of pollutants. The decision of the Ninth Circuit removes this discretion, blocking permits that may improve water quality simply because they do not clean it up entirely. Such a decision, mandating continued pollution rather than allowing a partial remediation, is contrary to the purposes of the CWA.

It was important to this Court in *Arkansas v. Oklahoma* that construction of new plants that would improve existing conditions might be thwarted by the Tenth Circuit's ruling. *Id.* The same type of development is at risk if the Ninth Circuit's decision is allowed to stand. Certiorari should be granted; the CWA should not be interpreted so narrowly that it prevents the accomplishment of its purpose in improving water quality.

IV. THE NINTH CIRCUIT'S INTERPRETATION OF THE CLEAN WATER ACT IS FAULTY, MISQUOTES THE ACT, AND ADDS PROVISIONS NOT INCLUDED IN THE STATUTORY LANGUAGE.

In interpreting clauses (1) and (2) of 40 C.F.R. § 122.4(i), the Ninth Circuit quotes "the plain language of clause (2)" as providing that "the existing *discharges* into that segment [of Pinto Creek] are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." *Friends of Pinto Creek*, 504 F.3d at 1012-1013 (emphasis added). The Ninth Circuit then goes on to define *discharges* and concludes that both permitted and non-permitted point sources must be in compliance with compliance schedules. *Id.* This whole line of reasoning is based on a misreading of the clause, which provides that "the existing *dischargers* into that segment are subject to compliance schedules." 40 C.F.R. § 122.4(i)(2) (emphasis added).

Although "Discharger" is not defined in the regulation, "Schedule of Compliance" is defined as "a schedule of remedial measures included in a '*permit*', including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." 40 C.F.R. § 122.2 (emphasis added). Thus, compliance schedules can be applied only to permitted dischargers into the relevant segment of the water body.

In requiring compliance schedules for non-point sources, the Ninth Circuit's interpretation requires the EPA to go beyond its statutory authority and ensure that non-point sources, regulated by the states and beyond the scope of the NPDES, are in compliance. 33 U.S.C. § 1329.

The Ninth Circuit held that, not only must compliance schedules be in place, but there must also be proof that they are being met under "existing circumstances." 504 F.3d at 1012. There is no language to this effect in that statute. The EPA is not required to ensure that each existing discharger is meeting its TMDL allocations before issuing a permit; it must simply ensure that sufficient allocations remain and existing dischargers are subject to compliance schedules. 40 C.F.R. § 122.4(i)(2).

The addition of these requirements, which are not in the statute or the regulation, requires such a narrow interpretation of the CWA that a *de facto* ban on any discharges into impaired waters is created. By requiring proof that waters will meet water quality standards after the permitted effluent is discharged, the Ninth Circuit has banned all discharges into impaired waters.

V. THE NINTH CIRCUIT SHOULD HAVE DEFERRED TO THE EPA'S REASONABLE INTERPRETATION OF ITS OWN REGULATION.

Over sixty years ago, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945), this Court articulated the now well-known rule of deference to an agency's interpretation of its own regulations:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . *[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.* (Emphasis added).

This principle has become known as "*Seminole Rock* deference" and has been followed consistently by this Court. *E.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In fact, adherence to this deference principle is especially important when, as in the instant case, an agency is charged with administering:

> "[A] complex and highly technical regulatory program" in which the identification and classification of relevant "criteria necessarily require significant expertise and . . . the exercise of judgment grounded in policy concerns."

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

This Court has held that, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall*, 380 U.S. at 16. The first analytical step under *Seminole Rock* is to determine whether the regulation is unambiguous. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000) (hereinafter "*Shoring up Chevron*"). If the regulation is unambiguous, a court will simply interpret the plain language of the regulation and hold unlawful an agency interpretation that is inconsistent with the plain language. *See id.*; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (according no deference to an agency's interpretation that conflicted with its unambiguous regulation); *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d 1214, 1219-1220 (9th Cir. 2002) (same). If, however, the regulation is ambiguous, a court must proceed to the second step and defer to the agency's interpretation unless that interpretation "is plainly erroneous or

inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; *Shoring up Chevron*, 34 U.C. Davis L. Rev. at 70-71.

The text at issue in this case is "cause and contribute." 40 C.F.R. § 122(4)(i). The EPA has determined that, when new source discharges into impaired waters are subject to conditions that improve the overall water quality, they do not cause or contribute to water quality violations. *In re Carlota Copper Company*, 11 E.A.D. 692 (EAB 2004). This interpretation is consistent with previous EPA actions. *Id.* Pet. App. at 165.

Because the offset conditions would cause Pinto Creek to be in a better state after the discharges than it is currently, the discharges will not cause or contribute to a water quality violation. This is similar to the principle behind the Water Quality Trading Policy. 68 Fed. Reg. 1608, 1609 (Jan. 13, 2003). This policy "allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs." *Id.* Such a policy allows the EPA to balance development with environmental protection, resulting in lower over all pollution levels.

Because of the offset conditions, when taken as a whole, the course of action authorized by the permit issued to Carlotta would improve, rather than impair, water quality. The EPA's interpretation, allowing issuance of the permit, is not contrary to the "plain language" of the regulation. If the regulation is

ambiguous, deference should be accorded to the EPA's interpretation because that interpretation is not "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414. This deference was the basis of the Minnesota Supreme Court's decision in *Annandale*, and it should have been applied by the Ninth Circuit in this case.

This Court should grant certiorari to resolve this conflict concerning the interpretation of the CWA and its regulation and also to reaffirm the correct standard of deference to be given to an agency's interpretation of its own regulations.

CONCLUSION

The EPA's interpretation of the CWA and its implementing regulations to allow discretionary issuance of permits containing offset conditions for the discharge of pollutants into impaired waters is reasonable. Such discharges do not cause or contribute to a violation of water quality standards. The split between the States on this issue impedes the CWA's goal of uniformity between the permitting programs administered by the EPA and the States. This Court should grant the petition to reinforce its ruling in *Seminole Rock* and to clarify that the EPA exercises broad discretion in issuing permits designed to further the goals of the CWA.

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